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Supreme Court, U.S.
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No. _____ OFFICE OF THE CLERK

In The
Supreme Court of the United States

AHMED AL-MARBU,
Petitioner,

v.

MICHAEL B. MUKASEY,
Attorney General of the United States,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a federal court of appeals has jurisdiction to review an immigration judge's denial of an alien's request to continue removal proceedings:

A. on a Due Process question of law basis, consistent with 8 U.S.C. Sec. 1252(a)(2)(B)(ii).

B. When the decision has the effect of a substantive ruling on the alien's potentially meritorious application to adjust status, consistent with the carve out-exception of 8 U.S.C. Sec. 1252(a)(2)(D) on a Due Process question of law basis?

II. Whether a severely defective hearing transcript that has been confirmed to have resulted in a prejudicial impact on Petitioner's ability to appeal his case, amounts to denial of one's Due Process right to a fair trial, including a consideration of the effect of a clear violation of the Court Reporter Act?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the Court of Appeals for the Seventh Circuit were Petitioner Ahmed Al-Marbu and Respondent Attorney General of the United States.

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INTRODUCTION - OVERVIEW

Hot legal issues of the day are the *raison d'etre* for the Supreme Court's Solomonic calling, and the case of Petitioner herein, Mr. Ahmed Al-Marbu, counsel submits, surely exemplifies that adage.

Question IA & B, the jurisdiction-denying question, presented at page i *infra* is *white hot now*. That is because the Seventh Circuit *en banc* is presently reconsidering its earlier jurisdiction-denying decision of *Potdar v. Keisler*, 505 F. 3rd 680 (7th Cir. 2007), at pp.17-18 herein, filed November 27, 2007, suggesting at p. 8 thereof, *en banc* consideration of the continuance-denial issue, and Petitioner's Rule 28 (j) filing of March 25, 2008 (per Pet. App. 96a-97a ["jurisdiction exists to review denial of continuances"].

Further, the jurisdiction-denying holding in the case of *Gulati v. Keisler*, No. 06-3221 2007 WL 2988632, (7th Cir. June 20, 2005) is presently pending before the Honorable Supreme Court.

The combined impact of the above two pending cases, is that a reversal of the respective present holdings in either case would likely have a material effect on the current status of Petitioner's case. Thus the granting of this petition is warranted, pending respective final resolution of either or both cases.

Despite the Seventh Circuit's denial of Mr. Al-Marbu's petition for review, solely on jurisdictional grounds, the record reflects that only a total of three (including the Seventh) Circuits in current holdings, determined no such jurisdiction existed. A strong

majority of eight circuits, however, have determined that jurisdiction does exist to entertain such a petition. See pp. 10-11 of Respondent's Brief in *Ali v. Mukasey*, 502 F.3d 659 (7th cir. 2007). (Pet. App. 75a-96a).

The Respondent seconded Petitioner *Potdar's* request for *en banc* rehearing because the Court's earlier disposition of *Potdar* "creates an inter-circuit conflict," *See* Pet App. at 88a-95a. Most interestingly, all parties to the pending *Potdar* case concur that 8 U.S.C. Sec. 1252(a)(2)(B)(ii) did not strip jurisdiction from the circuit courts to review the IJ's denial of a continuance, including reference for such action conferred by subsection (D) as stated below.

The genesis for the eight circuits - and *Subhan v. Ashcroft*, 383 F.3d 591 (7th Cir. 2004) earlier in the Seventh Circuit - to allow jurisdiction to review a continuance denial can be found at p. 585 of *Subhan*, "we have carved out a limited exception to the jurisdictional bar . . where a substantive ruling on the alien's application to adjust status is pending." See also Judge Posner's remarks in *Benslimane, id.* at p. 830.

Can the above denied-jurisdiction issue in Petitioner's case herein, get any hotter? "Yes" when one consider the blatant Due Process abrogation sticking out like a very sore thumb in Question I.B., at page i. *infra*.

In this regard, the Honorable Court's urgent attention is called to the following verbatim quote from INA Sec. 242 (a)(2)(D). 8 U.S.C. Sec. 1252(a)(2)(D): [Subsection D]:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

From Page One and Day One in Petitioner's appeal of the IJ's decision, Petitioner has strenuously objected to the denial of his (second) continuance request, a question of law per *Subhan Id.* This objection was separately joined with a constitutional claim of Due Process denial, a question of law because, per Question IB presented herein, of the hopelessly defective transcript he was provided in his case. Petitioner complied, *ab initio*, with the Seventh Circuit's requirement of submitting an affidavit (See Pet. App. 107a-116a and 117a-118a) proving up actual prejudice due to the severely botched Respondent-furnished transcript that made rendering a proper supporting brief impossible, and thus resulting in an *ipso facto* denial of his Due Process Rights. All the preceding is fully consistent with the Seventh Circuit's requirements catalogue of the well known cases of (*Kerciku v. INS*, 314 F.3d 913 (7th Cir. 2003), and *Benslimane v. Gonzales*, 430 F.3d 828, 830 (7th Cir. 2005).

Insofar as Petitioner's counsel is aware, the question of a defective transcript affecting an appellant's Due Process right to be heard, has never been considered by the Honorable Court, according to extensive research of the issue.

Per Question II, inasmuch as the defective transcript issue *alone* at the Seventh Circuit has essentially ignored this Due Process issue, despite all Circuits, including the Seventh in prior cases such as *Alade v. Ashcroft,* 69 Fed. Appx. 771, 774, WL 21461864 (7th Cir. 2003) *supra*, having considered it. The Court herein is urged to recognize the defective transcript issue as one of overriding importance and consider this issue for a "Bright Line" pronouncement.

OPINIONS BELOW

In Petitioner's case, the slip opinion of the Court of Appeals, Ref. App. 1a-7a, No. 04-2055/05-2824 is available at 2005 WL 3016124 (7th Cir. Sept. 26, 2007), and Petition For Review Denied By 248 Fed. App. 748 (7th Cir. Sept. 26, 2007, rehearing *en banc* denied March 28, 2008, Pet. App. 23a. The Decision of the Board of Immigration Appeals are at Pet. App. 12a-14a and 9a-11a, *In re Al-Marbu* A79546194, March 24, 2004 and May 24, 2005.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY BACKGROUND

The INA allows a court of appeals considering a final order of removal pursuant to 8 U.S.C. §1252 to review "all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien." Id.

§ 1252(b)(9). IN IIRIRA however, Congress amended the INA to preclude judicial review of any "decision or action of the Attorney General..., the authority for which is specified under this subchapter to be in the discretion of the Attorney General..., other than the granting of asylum. Id § 1252(a)(2)(B)(ii). The phrase "this subchapter" refers to subchapter II of Chapter 12 of Title 8 of the United States Code, which includes §§1151-1381.

In the "subchapter" reference to-specifically, 8 U.S.C. §1229a(a)(1) - Congress, among other things vested the IJ s with the general authority to "conduct proceedings for deciding the inadmissibility or deportability of an alien." Notwithstanding this language, an IJ'S express authority to grant or deny a continuance is not found in the particular subchapter where §1252(a)(2)(B)(ii) is contained. *See generally* 8 U.S.C. ch. 12 (entitled "Immigration and Nationality"). Instead, the authority is derived solely from regulations promulgated by the Department of Justice. See 8 C.F.R. § 1003.23 (stating that "[t]he Immigration Judge may grant a motion for continuance for good cause shown").

STATEMENT OF THE CASE

A. IMMIGRATION PROCEEDINGS BELOW

As fully documented in Petitioner's Brief to the Seventh Circuit on October 6, 2008. Petitioner entered the United States as a non-immigrant visitor on December 8, 2000 with authorization to remain here through June 7, 2001. About March, 2001, he timely

applied to the then-INS for change of status to that of an F-1 student, so that he could attend college.

While Petitioner's F-1 change of status application was pending, Petitioner married First Wife United States Citizen (USC) Brenda Al-Marbu on May 18, 2001, and they jointly filed an I-130/I-485 adjustment petition to that of permanent residence for Petitioner on June 26, 2001. Petitioner received a work permit during the pendency of this application, and proceeded to make a home with his first wife in Topeka, Kansas. Unfortunately, in late September 2001, the Petitioner, and his First Wife had an argument, leading to her contacting the then-INS indicating her desire to terminate that marriage, and to withdraw her I-130 petition.

As a result of her contacting the INS, Petitioner was arrested on October 2, 2001, and charged with overstaying his B-2 visitor visa status, though on October 2, 2001 Petitioner understands an application to change his visitor status to F-1 student status was pending.

Petitioner filed a FOIA request to reconfirm request to change his status to student, with the INS for which he never received a response. On November 29, 2001, Petitioner and his First Wife Brenda filed an amended I-130/I-485. Joint Petition for adjustment of Petitioner's non-immigrant visitor/student lawful status to that of Lawful Permanent Resident.

Petitioner and his First Wife first appeared in Immigration Court in Kansas City via video before the Immigration Judge sitting in Chicago on April 2, 2002.

At that time, Petitioner pled to the various matters presented in the Notice to Appear.

At this first hearing, Petitioner specifically denied the sole charge against him, being an "overstay, because he had a pending request for change of status." Unfortunately, Petitioner and his First Wife, after having resumed their marital relationship in early October 2001, decided to obtain a friendly divorce in Topeka, Kansas on October 2, 2002. Petitioner, a practicing Muslim, soon thereafter met Ms. Ayan Mohamad (aka Fartun Hassan), a Lawful Permanent Resident (LPR) for over 5 years, at a mosque they both regularly attended.

Petitioner and Second Wife Ayan, then married on November 7, 2002.

Petitioner had submitted to Respondent's Service Center at Lincoln, Nebraska an I-130 petition for Permanent Residence with the required attachments, filed approximately November 10, 2002. As of early November, 2002, they were expecting a child to be born in June, 2003.[1]

At the hearing before Immigration Judge O. John Brahos (IJ herein) on November 19, 2002, the IJ acknowledged Petitioner's request for a continuance Pet. App. 14a-22a of that hearing that was timely filed with the court on November 12, 2002. (Emphasis added).

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[1] They now have a total of two children together.

The notice of the November 19, 2002 hearing, per the understanding of the parties at the April 2, 2002 hearing, was that this was to be a Master Calendar Hearing. This Hearing was conducted by video conference with the Trial Judge sitting in Chicago, Illinois.

Petitioner had requested said continuance to allow time for his second wife's I-130 visa petition filed November 10, 2002, to be adjudicated, and for her to receive an interview on her pending naturalization application and eventual swearing in that would lawfully elevate Petitioner's status as beneficiary of said I-130 petition to that of an immediate relative. "Immediate relative" status, at law, means that Petitioner would statutorily be eligible for consideration by the trial judge for relief from the charge against him, primarily to that of adjustment of his status to Lawful Permanent Residence.

Petitioner, in his Motion for Continuance, in addition to citing the pending I-130 as a basis for same, also requested additional time to investigate and obtain evidence, through a FOIA requested copy of Petitioner's INS file. Petitioner reasonably believed his student visa application to be timely filed and would potentially confirm the pendency of his change of status request to that of an F-1 student, when he was nevertheless being charged with being an overstay. The IJ was informed by Respondent's Trial Attorney that a new I-130 petition by the-then LPR Second Wife had been filed, before said hearing, and was awaiting INS adjudication. With the respect to the *bona fides* of this marriage, the Trial Judge was informed by Respondent's attorney that the Second Wife, who had

filed said I-130 petition, was present before the Judge, that she had an appointment with a doctor and was likely pregnant. Petitioner thus had demonstrated the required *bonafides* of the marriage, per INA sec. 245(e)(3)(8), U.S.C. sec 1255(e)(3), as amended by the Immigration Act of 1990, Pub. L. No. 101-649, Sec. 702(a), 104 Stat. 4978. Both Petitioner and his attorney attempted to give more reasons to approve the continuance request, but these are not contained in the defective court-ordered transcript. See Petitioner's affidavit, Pet. App. 107a-116a and 117-118a.

To explain why he would not grant Petitioner's requested Motion for Continuance, the Trial Judge stated "You could take an appeal of that decision. During the appeal process if it's approved, the I-130, you can ask it to be remanded." Petitioner's motion for continuance was summarily denied.

Despite sharp protestations by Petitioner's counsel, the Immigration Judge, during this video conference Master Hearing, stated that he had already made a determination of removability, giving no reasons on this botched transcript for such a decision. He was essentially unwilling to continue this case to allow time for the I-130 petition to be adjudicated, for Appellant's wife to become a citizen, so as to then permit consideration of an I-485 application for permanent residence. Also, the Judge would not allow Petitioner time to investigate the *bona fides* of Petitioner's long standing contention that he was charged as an overstay while, inexplicably, he was in proper status and not an overstay.

Petitioner's second appearance before the Judge, on November 19, 2002 (continued from the April 2, 2002, hearing), resulted in an Oral Decision/Order of the Immigration Judge denying the continuance request as stated above, and ordering Petitioner's removal. Pet. App. 14a-22a. Voluntary departure of 110 days was granted on November 19, 2002. Confirmation of Petitioner being properly in status, when the so-called overstay charge was instituted against him, could be seen from the record, that Petitioner had been the recipient of a proper work authorization during the same time frame.

The record, though often "indiscernible," indicates that during his Master Calendar (not Individual Merits') Hearing on November 19, 2002, Petitioner was not permitted to explain the *bona fides* of his presence in the United States *vis a vis* the overstay charge against Petitioner.

The BIA confirmed receipt of Petitioner's Appeal on December 12, 2002, Petitioner filed lengthy briefs with the BIA on May 23, 2003 and July 18, 2003, explaining in detail, the reasons, as stated above, why Petitioner's case should have been routinely continued, and also describing the need for a remand due to the impossibility of a proper appeal because of 11 (or 13?) "indiscernible (or "inaudible") references." in the hearings transcripts as aforesaid. Undersigned attorney for Petitioner repeated his request to the BIA in said briefs, to reverse the Judge, by granting a continuance to permit adjudication of the I-130 petition under the well known *Matter of Arthur* and *Matter* 20 I & N Dec. 475 (BIA 1992) and *Matter of Velarde-Pacheco* 23 I & N Dec. 253 (BIA 2002), but

also, much of the testimony on this point was described as "indiscernible" in the transcripts.

Petitioner supplied an Affidavit concerning the prejudicial effects of the "indiscernible" portions of the transcript on his case, and evidence submitted to the Immigration Judge explaining why such "indiscernible" references made for an impossible appeal. That in said Affidavit, among other things, Petitioner specifically cited the prejudicial omissions due to the transcripts' 11 "indiscernible" (or "inaudible") references.

On March 24, 2004, the BIA rendered its Decision, affirming without opinion the Immigration Judge's Decision The boilerplate, plain wording of the Per *Curiam* Order, with the first paragraph containing 21 words, indicates on its face that it failed to take into account any portion of the fully reasoned ten page Appeal Brief and 13 page Supplemental Appeal Brief submitted by Petitioner.

Further, the Honorable BIA did not give any explanation as to why it believed the Respondent produced evidence that established clearly, unequivocally and convincingly Petitioner's removability.

Petitioner filed his Motion for Reconsideration on April 27, 2004, dealing with many of the issues herein, particularly the Board's boilerplate decision, including the BIA having totally ignored the defective transcript issue, and remand per *Matter of Arthur, Ibid.*

Petitioner received an approved I-130 Visa Petition in November, 2003. Petitioner then requested a reconsideration and remand on April 23, 2004, to permit requested consideration of his I-485 Permanent Residence application filed April, 24, 2004. All the above was pointed out at length in the notice of appeal and accompanying briefs to the above Board. The BIA denied this Motion, unbeknownst to both Petitioner and his undersigned attorney on June 3, 2004. Said denial was "unbeknownst" because the BIA decision was mistakenly never sent to undersigned attorney but purportedly directly, uncertified to Petitioner (*pro se!?*) who never received it.

Petitioner timely filed his Petition for Review, including a separate Motion For Stay of Removal, with this Court on April 23, 2004.

Further, Petitioner's Second Wife, who filed an I-130 visa petition for him in November, 2002, was granted her citizenship in late November, 2003. So she then filed an immediate relative visa petition for Petitioner in January, 2004, which had the legal effect of automatically upgrading her approved visa petition of November, 2003, to that of immediate relative status for petitioner in January, 2004, which was further approved on December 10, 2004. Respondent Appellee filed the Administrative Record of Proceeding regarding Case A, with the Seventh Circuit on September 19, 2004.

Stay of Removal was granted by this court, per Judge Wood, on December 30, 2004, pending resolution of the Petition For Review.

Based on said newly approved I-130 for his wife's immediate relative petition, Petitioner filed a Motion to Reopen and Remand within the 90 day statutory filing requirement including a repeat from the March 24, 2004, filing of Petitioner's I-485 application for Adjustment of Lawful Permanent Residence status.

Petitioner's Motion to Reopen was denied by the BIA on May 24, 2005, after refusing to allow Petitioner to fully brief the Court under a totally mistaken belief that Petitioner was "in detention", when he was not. (Emphasis added).

This Decision of the Honorable BIA makes no indication that a review of the record was conducted, as part of consideration of this appeal, consistent with the requirement of *Matter of Ramos*, 23 I&N Dec. 336, 338 (BIA 2002) and the requirement of 8 C.F.R. §§ 3.2(b)(2), 3.23(b)(3). That on July 1, 2005, Petitioner filed with the BIA, his Amended Motion to Reopen and Remand, and for a sixty day Stay of its May 24, 2005, Order, describing a serious BIA error pertaining to Petitioner's being so-called "detained." He was actually free on bond continuously from October 2, 2001, to the present, per attached USCIS Bond Documentation.

Importantly, this "in detention" error, led the BIA to not consider Petitioner's other arguments, concerning an "indiscernible" transcript, extension of voluntary departure, etc. If there was a validly filed visa petition, that was approved or unadjudicated, the naturalization of the spouse [Per Petitioner's spouse herein] under U.S. law required the automatic upgrading from a second preference visa petition to an immediate relative petition.

This Court consolidated Case A and Case B for appeal purposes, on its own Motion on June 23, 2005.

B. THE COURT OF APPEALS' DECISIONS

On appeal, the Seventh Circuit held that 8 U.S.C. Sec. 1252(a)(2)(B)(ii), per *Syed Iqbal Ali v. Gonzalez,* 502 F.3d. 659 (7th Cir. 2007), and Question I.A. herein,, that the court lacked jurisdiction to review the IJ's decision denying Petitioner's motion for a continuance on September 26, 2007. Pet. App. 1a-8a. The court's decision omitted any reference to his Number I.B. issue on appeal, that is the severely defective transcript with demonstrated prejudicial impact, that made such an appeal impossible, a lack of Due Process issue of law clearly encompassing the court's jurisdiction under 8 U.S.C. Sec. 1252(a)(2)(D), see p.2 herein.

Petitioner, doing as instructed by the IJ, appealed the IJ's decision to the BIA. He argued that the IJ'S denial of a continuance was erroneous under both BIA and Seventh Circuit precedent. The BIA rejected Petitioner's arguments, per Pet. App. 9a-11a and 12a-13a(both denials) and concluded that the IJ had given adequate reasons for denying the continuance based on the evidence. Said rejection totally failed to consider that such "evidence" was completely lacking, because the defective transcript of that hearing was prejudicially botched, making for a full consideration of that hearing impossible. Of course, this was a denial of Petition's Due Process Rights for a substantive ruling on his continuance motion that might result in a lawful adjustment of status a la *Subhan's* holdings. The BIA thus affirmed the IJ's decision and granted

Mr. Al-Marbu sixty days to depart the country voluntarily. Petitioner moved for reopening/ reconsideration, but the BIA denied the motion. *Infra*.

A timely petition for rehearing en banc was filed in the United States Court of Appeals for the Seventh Circuit, and was denied on March 26, 2008. See Pet. App. 23a-24a.

Immediately prior to the filing of his petition for review to the Seventh Circuit on April 23, 2004, applicable precedential case law that supported Petitioner's continuance motion was found in *Subhan v. Ashcroft*, 383 F.3d 591 (7th Cir. 2004) where Judges Posner, Rovner, and Diane P. Wood held at pp. 595-596, according to *Syed Iqbal Ali, infra*, at p. 5 carved out a very limited exception to the jurisdictional bar, citing 8 U.S.C. §1252(a)(2)(B)(ii). In *Subhan, Id.* and *Benslimane, Id*, the Seventh Circuit held that the denial of a discretionary continuance is reviewable when the decision has the effect of a substantive ruling on the alien's *potentially* meritorious application to adjust his status. *Benslimane*, 430 F.3d at 832; *Subhan*, 383 F.3d at 595-596. The IJ in those cases denied the petitioner's motions for continuance despite that the agency - by no fault of the petitioner's-had not yet acted on their petitions for adjustment. *Benslimane*, 430 F.3d at 830-31; *Subhan*, 383 F.3d at 593-94. Because the petitions were pending when the IJs ordered the petitioners removed, these Seventh Circuit panels determined that the IJ s denials of continuance effectively constituted substantive rulings on the merits of the petitions. *Benslimane*, 430 F.3d at 832; *Subhan*, 383 F.3d at 595-96.

However, the exception granting jurisdiction in *Subhan* and *Benslimane* was inexplicably not applied to Petitioner's case. In *Ali, infra*, the IJ's denial of a continuance had no bearing on Ali's I-130 petition because that petition was denied before the IJ found Ali removable; in contrast, in both *Subhan and Benslimane,* [like Mr. Al-Marbu herein] the Petitioner's I-130 petitions were still pending when the IJ's rejected their requests for continuances. The IJ's denial of *Ali's* request a for continuance thus did not have the effect of a substantive ruling on *Ali's* I-130 petition, and "we accordingly lack jurisdiction to review that denial", per p.5 of the decision in Petitioner's case.

The above represented the Seventh Circuit's synthesis of current applicable Seventh Circuit law permitting Petitioner's case to be cognizable jurisdictionally, and then to be considered on its merits, particularly including the defective transcript issue, Question Number I.B. and Question II herein, clearly a question of law. See *Benslimane, infra*. That is because in the seminal *Subhan*, and the very recent case of *Syed Iqbal Ali v. Gonzalez,* 502 F. 3d 659 (7th Cir. 2007), the sole given citation in denying Petitioner's petition, is that its holding in *Leguizamo-Medina, supra* about three weeks earlier in September before its decision in Petitioner's case, precluded the Court's jurisdiction to consider the merits of petitioner's case.

Interestingly, Chief Judge Easterbrook, at p. 775 of *Leguizamo - Medina v. Gonzales*, 493 F.3d 772 (7th Cir. 2007), Pet. App. 122a-130a, opined that, subsection (D) *infra* concerning a continuance request is "a question

of law that may be reviewed." But Judge Easterbrook emphasized at p. 774 that the Petitioner "makes two factual arguments." He also noted the Seventh Circuit's interpretation "that only legal questions (as opposed to a factual characterization or a "mixed question") are covered by subsection (D)."

Amazingly, for purposes of the panel's sole basis of its decision in Petitioner's case (*Ali, infra*, that in turn was solely based on *Leguizamo-Medina*), Judge Easterbrook goes on to find at p. 775, that in line with majority of circuits, "that subsection (D) could in principal allow review of a final order to determine whether procedural errors along the way to decision violated the aliens constitutional or statutory rights." See Pet. App. 122a-130a (*Leguizamo* case)

There's more, in *Leguizamo-Medina, infra* Chief Judge Easterbrook at p. 776, says he would have "found jurisdiction to review the continuance denial but only for the fact that it was not timely filed by the 14-day deadline." He said that the Petitioner who made her continuance motion the day of the hearing, "has never explained why it could not have been made earlier." Per Pet. App. 122a-130a. As detailed to the Seventh Circuit, Petitioner *explained to the IJ that he filed his continuance motion a seven days prior to the hearing, very timely* filed since it referred to his wife's I-130 petition having been filed with the USCIS on November 10, 2002, only two days before the continuance motion was filed with the Chicago IJ.

The chronological statement of this case, at pp. 6-12 herein confirms that Petitioner's motion for

continuance, if granted, would have been only his second continuance.

The *Ali* decision lists six (now eight) Circuits by name, as finding jurisdiction to consider a continuance denial comparing that to the Seventh Circuit denial, along with only two other circuits, by the Eighth and Tenth with older 2004 decisions with the minority view.

The obvious corollary to Judge Easterbrook's finding, at p. 775 of *Leguizamo-Medina, Id.* is that subsection (D) gives the court jurisdiction to indeed review questions of law for Petitioner and the many others in the minority circuits in a similar predicament. This is particularly true where the petition has submitted a timely notice for continuance within the applicable time basis for such presentment *including an explanation as to why said continuance request could not have been filed earlier.* (Emphasis added)

REASONS FOR GRANTING THE WRIT

I. Whether a federal court of appeals has jurisdiction to review an immigration judge's denial of an alien's request to continue removal proceedings:

A. On a Due Process question of law basis, consistent with 8 U.S.C. Sec. 1252(a)(2)(B)(ii); or

B. When the decision has the effect of a substantive ruling on the Alien's potentially meritorious application to adjust status consistent with the carve-out exception of 8 U.S.C. Section 1252(a)(2)(D) on a Due Process question of law basis

In ruling that denials of continuance in removal proceedings are beyond the jurisdiction of the appellate courts, the Seventh Circuit has given the jurisdiction-stripping statute at issue an expansive reading. This is clearly in direct conflict with the recent decisions of eight other circuits. Further, the denial to Petitioner is in substantial tension with decision of the United States Supreme Court, and contrary to the text of the provisions of laws at issue. Two other circuits, with much older decisions, are relied upon by the Seventh Circuit. The circuit courts have acknowledged that they are divided eight-to-three over a question of considerable, practical importance. This Court's review is warranted to restore consistency to the nation's immigration laws.

I.A. AA. THE COURTS OF APPEALS ARE DIVIDED 8-3 ON THE QUESTION WHETHER 8 U.S.C. 1252(A)(2)(b)(ii) REMOVES JURISDICTION TO REVIEW AN IMMIGRATION JUDGE'S DENIAL OF A CONTINUANCE

The Attorney General expressly and very recently acknowledged in *Potdar v. Mukasey*, *Id.* at pp.8-10 thereof, that there is clear split in the courts of appeals over whether 8 U.S.C. § 1252(a)(2)(B)(ii), Pet. App. 27a et seq., strips jurisdiction to review an IJ's decision to deny a continuance in removal proceedings. Eight circuit courts have held that § 1252(a)(2)(B)(ii) does not deprive them of jurisdiction to review a continuance decision. The Eighth and Tenth Circuits in 2004 decisions, recently joined by the Seventh Circuit, have held directly to the contrary.

The First, Second, Third, Fourth, Fifth, Sixth, Ninth and Eleventh Circuits have all held that §1252(a)(2)(B)(ii) does not strip their jurisdiction to review continuance denials. With the exception of the Sixth Circuits, all of these circuits focus on the statute's "requirement that the discretion giving rise to the jurisdictional bar must be 'specified' by statute." *Khan v. Att'y Gen.*, 448 F.3d 226, 232 (3d Cir. 2006) (internal quotation marks omitted). Relying on the clear statement rule, the other seven courts of appeals have held that jurisdiction exists to review a continuance decision because "the language of the statute in question must provide the discretionary authority before the bar can have any effect." *Id.* Here, "the authority of an IJ to grant a motion for continuance is derived solely from regulations." *Zafar*

v. Att'y Gen, 461 F.3d 1357, 1360 (11th Cir. 2006). It has been observed by the Fifth Circuit that the statutory language is "uncharacteristically pellucid" about which decisions are unreviewable and that this language does not include discretionary denials of continuance. *Zhou v. Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005); *Ahmed v. Gonzales*, 436 F.3d 433 (5th Cir. 2006), *Alsamhouri v. Gonzales*, 484 F.3d 117, 122 (1st Cir. 2007); *Sanusi v. Gonzales*, 445 F.3d 193, 198 (2nd Cir. 2006); *Lendo v. Gonzales*, 493 F.3d 439, 441 n.1 (4th Cir. 2007); *Khan v. Attorney General*, 448 F.3d at 232 (3d Cir. 2006). See *Martinez vs. Gonzales*, 166 F. App'x 300, 300 (9th Cir. 2006), and *Abu-Khaliel v. Gonzales*, 436 F.3d 627, 632 (6th Cir. 2006).

In contrast, the Seventh, Eighth, and Tenth Circuits have held that "[t]he jurisdictional bar [of 8 U.S.C. §1252(a)(2)(B)(ii)] [Pet. App. 27a et seq.]...applies to continuance decisions." See *Onyinkwa v. Ahscroft*, 376 F.3d 797, 799 (8th Cir. 2004). In *Ali v. Gonzales*, which was the basis for the court's analysis in *Gulati v. Keisler* No. 06-3221, WL 2988632 (7th Cir. 2007), the *Gulati* court reasoned that an immigration judge's authority to grant or deny a continuance is conferred by 8 U.S.C. §1229a, giving IJ's "plenary authority" over removal proceedings. The Eighth and Tenth circuits have similarly reasoned that "[w]henever a *regulation implementing* a subchapter II statute confers discretion upon an IJ, IIRIRA generally divests courts of jurisdiction to review the exercise of discretion." *Onyinkwa*, 376 F.3d at 799. See also *Yerkovich v. Ashcroft*, 381 F.3d 990, 993 (10th Cir. 2004).

When considering the Seventh Circuit's, *Ali* decision, the split in the courts of appeals is firm and will likely not benefit from further decisions in the lower courts. To be sure, the *Potdar* case, currently pending *en banc* at the Seventh Circuit may shed further light on "this difficult issue" (per Judge Easterbrook at p. 775 of *Leguizamo-Medina, supra* and p. 14 herein). However, this will only benefit Petitioner if this court will place his case "on hold" or "stay the mandate" pending the Seventh Circuit's decision.

Immigration is the context of the circuit split on the question presented in this case, and is of substantial impact because it is an area this Court has recognized as a paramount need for "the Nation [to] speak with one voice." *Zadvyadas v. Davis*, 533 U.S. 678, 700 (2001). The clear, direct and mutually acknowledged deep split2 in the circuits thus demands the attention of this Court.

The Seventh Circuit, on December 10, 2007, issued an order directing the government to respond to a petition for rehearing *en banc* in *Potdar v. Keisler*, 505 F.3d 680 (2007).3 The threshold question raised by that petition is whether the panel erred in concluding that "it lacked jurisdiction under 8 U.S.C.1252(a)(2)(B)(ii) to review a denial of a continuance requested by [the alien] to enable him to pursue an application for adjustment of status." Pet. For Reh'g at 1, *Potdar, supra*. On February 11, 2008, the government filed a response, in which it urged *en banc rehearing* on the issue of its jurisdiction over continuance denials. Resp. to pet. For Reh'g at ??, *Potdar, supra* (Response). There accordingly is some prospect that the Seventh Circuit may reconsider its

ruling on the question presented. With this action in mind, the court should consider its thoughts expressed very recently in *Dada v. Mukasey*, 554 U.S.____(2008) No. 06-1181 where it stated at p.18 that "the DOJ's proposed interpretation of the statutory and regulatory scheme . . . warrants respectful consideration."

IA BB. THE SEVENTH CIRCUIT'S INTERPRETATION OF THE JURISDICTION-STRIPPING STATUTE IGNORES RECENT DECISIONS OF THIS COURT, INCLUDING CONSIDERATION OF *BOUMEDIENE*, AND IS CONTRARY TO BOTH THE PLAIN TEXT OF THE PROVISION AT ISSUE AND ITS MEANING AS SUGGESTED BY IIRIRA VIEWED AS A WHOLE

This Court has directed that courts should narrowly construe jurisdiction-stripping statutes and especially so in the immigration context. In *INS v. St. Cyr*, 533 U.S. 289, 298 (2001), this Court held that despite specific jurisdiction-denying provisions of IIRIRA, in immigration cases there still exists a "strong presumption in favor of judicial review of administrative action." This Court reaffirmed the principle relied on in *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986), that "Congress intends judicial review of administrative action...unless there is persuasive reason to believe that [cutting off judicial review] was the purpose of Congress." *Id* (internal citations omitted); see also *McNary v. Haitian Refugee Ctr., Inc.* 498 U.S. 479, 498 (1991) (recognizing the 'strong presumption in favor of judicial review of administrative action"). Applying this presumption in the context of immigration, this

Court's decision in *St. Cyr* expressly recognized that "[f] or the INS to prevail, it must overcome...the strong presumption in favor of judicial review of administrative action..." *St. Cyr*, 533 U.S. at 2984; see also *Felker v. Turpin*, 518 U.S. 651, 661 (1996)(declining, in the immigration context, to find a repeal of habeas jurisdiction by implication).

In *Bowen*, this Court endorsed a "clear statement" approach to any congressional action purporting to strip judicial review. *Bowen*, 476 U.S. at 671-72. This Court indicated that this approach recognizes that as a default, judicial review exists. Id. at 671. This Court, relying on *Abbott Laboratories v. Gardner*, 387 U.S. 136, 141 (1967), noted that "only upon a showing of 'clear and convincing' evidence of a contrary legislative intent, should the courts restrict access to judicial review." *Bowen*, 476 U.S. at 671 (quoting *Abbott Labs.*, 387 U.S. at 141 (internal citations omitted)).

There is a presumption of judicial review of actions taken during administrative proceedings, per *Bowen, infra* including removal proceedings before an IJ. See *Ardestani v. INS*, 502 U.S. 129, 131 (1991) (describing removal proceedings as "administrative"). In *Bowen*, this Court discussed at length the legislative history of the Administrative Procedure Act, 5 U.S.C. 551-559, 701-706 ("APA"), and concluded that it reinforces the presumption of justiciability. APA, stated, according to this Court: very rarely do statutes withhold judicial review...[without judicial review,] statutes would in effect be blank checks drawn to the credit of some administrative officer or board." *Bowen*, 476 U.S. at 671 (quoting S. Rep. No. 79-752, at 26 (1945)). Importantly, the House Judiciary Committee "agreed

that Congress ordinarily intends that there be judicial review, and emphasized the clarity with which a contrary intent must be expressed." *Id.* The House Committee explained, according to the *Bowen Court*, "To preclude judicial review under [the APA], a statute, if not specific in withholding [judicial] review, must upon its face give clear and convincing evidence of an intent to withhold it." *Id.* (Quoting H.R. Rep. No. 79-1980, at 41 (1946)). Congressional intent to retain judicial review of administrative actions absent a clear statement removing such review, is thus demonstrated in its legislative history.

This court knows that the basis for its retention of judicial review of issues such as the IJ's denial of a continuance, can be further found in its decision last week in the case of *Boumediene, et al. .v. Bush, President of the United States, et al.*, No. 06-1195, decided June 12, 2008.

Of course, in *Boumediene*, this court dealt with the detainees at Guantanamo Bay, Cuba, and Congress' attempt at jurisdiction-stripping of their access to the constitutional right to *habeas corpus*. To give rigorous review of the present Seventh Circuit minority view in Petitioner's case, this court may well decline to give effect to said minority view that Congress could or intended to strip judicial review from the Due Process provisions of the Amendment V Due Process right to a fair-trial, by denying review of a routine second continuance denial. See *Subhan, infra*, that the Seventh Circuit, per *Leguizamo-Medina, infra* decision, says is still good law *Subhan* stated that the denial of a third continuance request was an abuse of

discretion and denial of Due Process. The very recent *Ahmed*, *Id* case reconfirmed that principle.

Respondent recently stated to the Seventh Circuit in *Potdar*, "Accordingly, because the issue of the Court's jurisdiction involves a question of "exceptional importance," this Seventh Circuit Court should rehear and fully consider the issue *en banc*." See Pet. App. 75a-95a. Also, *see* Fed R. App. Pro. 35(a)(2).

Accordingly, the Seventh Circuit erred when it held that 8 U.S.C. § 1252(a)(2)(B)(ii) strips federal courts of the authority to review any discretionary immigration decision antecedent to a specified statutory decision, regardless of whether it is "specified under the subchapter." The jurisdiction-stripping provision is clear: "[I]t does not allude generally to 'discretionary authority' or to 'discretionary authority exercised *under this statute*,' but specifically to 'authority for which is specified under this subchapter to be in the discretion of the Attorney General,'" *Zhou v. Gonzales*, 404 F.3d 295, 303 (5th Cir. 2005) (emphasis in original)

I.A. CC. WHEN COMPARED TO THE LANGUAGE OF IIRIRA'S TRANSITIONAL RULES, 8 U.S.C. § 1252(a)(2)(B)(ii) MUST BE READ TO CREATE ONLY A NARROW EXCEPTION TO JUDICIAL REVIEW

With reference to the text of the transitional rules enacted as part of IIRIRA, reading 8 U.S.C. § 1252(a)(2)(B)(ii), Pet. App. 27a et seq., also requires that the jurisdiction-stripping provisions be construed narrowly. IIRIRA's transitional rules govern judicial review of immigration proceedings where the

proceedings began before IIRIRA's effective date of April 1, 1997, and where no final order was entered by October 30, 1996. See IIRIRA § 309(c)(4)(E), Pub. L. No 104-208, 110 Stat. 3009-1, 3009-625-3009-626 (1997). Only with regard to these transitional cases, Congress withdrew jurisdiction over "any discretionary decision" made pursuant to several enumerated section of the INA. IIRIRA § 309(c)(4)(E), 110 Stat. at 3009-626 (removing judicial review of discretionary decisions in adjustment of status or removal proceedings made under INA § § 212(c), 212(h), 212(i), 244, and 245).

Congress used distinctly different language in defining the permanent jurisdiction described in 8 U.S.C. § 1252(a)(2)(B)(ii). Instead of referring to "discretionary decision," as did the transitional rules, the new § 1252(a)(2)(B)(ii) denies jurisdiction to review acts "the authority for which is specified to be n the discretion of the Attorney General." 8 U.S.C. § 1252(a)(2)(B)(ii). It is a well-established canon of statutory interpretation that the use of different terms within a statute demonstrates that Congress intended to convey a different meaning for those terms. See *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 174 (1993) (requiring that each word in a statute be given distinct meaning to best effectuate Congress's intent).

I.A. DD. THE ATTORNEY GENERAL IS IN FULL AGREEMENT WITH THE MAJORITY INTERPRETATION ADVOCATED BY PETITIONER

The Attorney General has agreed with Petitioner's position for more than a year "that because

continuance are references only in the immigration regulations, not the statutes, the discretionary authority to grant or deny a continuance is 'not specified under this subchapter' within the meaning of 8 U.S.C. § 1252(a)(2)(B)(ii), and the jurisdictional bar therefore does not apply." See *Subhan*, *id.*, and Pet. App. 27a et seq. On the other occasions, and most recently, in its Memorandum in Opposition to Stay, filed January 14, 2008, the Attorney General has reaffirmed this position in explicit terms.

Accordingly, this Court should grant certiorari to harmonize the circuits on a critical question of immigration law and to bring their interpretations of IIRIRA's jurisdiction-stripping provision in line with words of the statute and this Court's precedent.

The government's applicable regulation pertaining to hearing continuances is as follows:

> 8 C.F.R. 3.29, states the immigration regulations provide that the IJ may grant a continuance "for good cause shown,"

The above citation was summarized in the following respective excerpts: Alien is generally entitled to favorable exercise of the immigration judge's (IJ's) discretion regarding request for continuance where the District Director has not yet adjudicated *prima facie* approvable visa petition and adjustment of status application. 8 C.F.R. 3.29 See *Hassan v. INS*, 110 F.3d 490 (7th Cir. 1997) at p. 492.

Judge Posner stated in *Subhan v. Ashcroft*, 383 F.3d 591 (7th Cir. 2004), at p. 595, " we conclude that

the immigration judge, seconded by the Board of Immigration Appeals, which affirmed him without discussing his denial of the continuance, *violated section 1255(i)* [Emphasis added] when he denied *Subhan* a continuance without giving a reason consistent with the statute (indeed without giving any reason). So the order of removal cannot stand..."

Consistent with 8 U.S.C. sec. (a)(2)(B)(i), and per *Subhan*, *Id.* at p. 593, the IJ's finding the alien was not eligible for a third continuance was not a reason, but "merely a statement of the obvious: the [government] hadn't yet acted."

As in I.A. above, the circuits are currently split eight in favor of granting jurisdiction to review a continuance motion and three opposed. Virtually all such decisions contain Due Process bases in reaching their respective conclusions.

I.A. EE. THE REVIEWABILITY OF CONTINUANCES IN REMOVAL PROCEEDINGS ARISES FREQUENTLY AND IS OF GREAT CONSEQUENCE IN ACHIEVING THE JUST AND UNIFORM IMPLEMENTATION OF OUR IMMIGRATION LAWS

Hundreds or likely thousands of litigants each year have their rights impacted yearly by the continuance-denial issue presented in this case. Almost three hundred thousand immigrants were subject to removal proceedings in fiscal year 2006. Executive Office for Immigration Review, Office of Planning, Analysis, &

Technology., FY 2006 Statistical Yearbook, at C3 (2007), available at http://www.usdoj.gov/eoir/statspub/fy06syb.pdf. Many of these immigrants request continuance during their removal proceedings, and continuance are appropriate for numerous reasons, including "to allow the alien time to obtain representation or to file an application for relief." *Id.* at B1. Many other immigrants request continuances during proceedings to adjust status.

While the ultimate decision whether to grant an adjustment status may be discretionary, 8 U.S.C. §1225(a), an immigrant's opportunity to fully and fairly present one's case is nonetheless a matter of significance. Thus, *the loss of the ability to make one's case because an IJ has arbitrarily denied a continuance is a matter of great consequence.* [Emphasis added]

Continuances play an especially important role in removal cases and whenever an adjustment of status may be at issue. The process of adjustment often presents aliens with substantial challenges such as procuring the proper documentation in a timely fashion, which can impede the smooth processing of their applications to adjust. A willingness to make reasonable allowances by the grant of continuances to allow good faith efforts to provide the required information thus may often be dispositive in carrying out the statute's purposes.

II. Whether a severely defective hearing transcript that has been confirmed to have resulted in a prejudicial impact on Petitioner's ability to appeal his case, amount to denial of one's Due Process right to a fair trial, including a consideration of the effect of a clear violation of the Court Reporter Act?

This Court has never issued a decision, bright line, nor otherwise, as to the effect a clearly defective transcript has on the due process rights of a litigant. This is an issue that cuts across all types of proceedings and certainly thousands of cases and this case presents the perfect vehicle to meet the issue head-on.

On the other hand, the 3rd and 4th Federal Practice Digests at head note Aliens, et al #578 and Constitutional Law Sec. 4440, in "defective transcript" cases, has reported about 345 such appellate cases between January, 1997 through April 30, 2008. All such reported cases that included an appellant affidavit detailing a prejudicial impact due to the defective transcript appeared to involve 26 of such cases, and were decided in the alien's favor. An approximate 24 cases, that included no such affidavit, were generally decided adversely to appellant.

The relevant law involved is as follows: 8 U.S.C.§1229 a. (b)(4), INA Sec. 240(b)(4) and (c), states as follows: "an alien has "rights in proceedings," including.... (C) "a complete record [that] shall be kept of all testimony and evidence produced at the proceeding." See Pet. App. 25a; 28 U.S.C.A. Sec. 753(b), The Court Reporter Act - essentially requires

a complete, verbatim record of the proceedings to be furnished to the litigants, at *See* Pet. App 56-58a, pp. 2-3 thereof.

According to the West's Federal Practice Digest, 4th Edition, at Sec. 385 heading Sec. 640 from January 11, 1997 to the present, approximately 345 cases have dealt with the defective transcript issue, but none have been decided by this Court.

This Court can take judicial notice that video-type proceedings are being conducted at many trial courts, state and federal, civil and criminal, throughout this country. As a result thereof, there appears to be substantial difficulty in preparing typed transcripts of same for appellate purposes, due to poor sound or other equipment problems. Undersigned attorney advises he recently received a transcript in a separate immigration proceeding that is literally riddled with about fifty "indiscernible" or "inaudible" references.

Petitioner respectfully submits that he was denied Due Process, because the transcripts of the two hearings herein were rendered constitutionally defective, due to its eleven references to "indiscernible" (or "inaudible") testimony that prejudiced his cases herein, See Petitioner's affidavit, reference, infra.

This Court reviews Due Process, U.S. Constitution Amendment V challenges to immigration proceedings. According to *Kuschchak v. Ashcroft*, 366 F.3d 597, 602 (7th Cir. 2004) "a Petition must produce "concrete evidence" indicating that the Due Process violation had the potential for affecting the outcome of the hearing," per Judge Ripple.

Respondent must present a clear definition of its administrative record. 8 C.F.R. 1240.9. Where the record is inadequate, the case will be remanded. *Okoroha v. INS*, 715 F.2d 380, 383-84 (8th Cir. 1983); *Choi v. INS*, 798 F.2d 1189, 1193 (8th Cir. 1986) [Remanded where decision not based on consideration of the full record]. Pet. App. 107a-116a and 117a-118a.

According to the Seventh Circuit in *Alade v. Ashcroft*, 69 Fed. Appx. 771, 774, WL21461864 (7th Cir. 2003), a removal hearing transcript containing 30 "indiscernible references" *would violate Due Process rights if prejudice could be shown*. [Emphasis added, no prejudice shown]

The Seventh Circuit has declared that the Respondent has a "duty to prepare a reasonably accurate, reasonably complete transcript." *Ortiz-Salas v. INS* 992 F.2d 105, 106 (7th Cir. 1993). In *Ortiz-Salas,* Respondent-prepared transcript had 292 areas marked "indiscernible" or "inaudible", but per p. 107, "no affidavit was submitted to show that the testimony not transcribed was material [contrary to Petitioner's Affidavit Reference]. Pet. App. 107a-116a and 117a-118a.

The split among the circuits is exemplified in *Silva-Calderon v. Ashcroft*, 371 F.3d 1135 (9th Cir. 2004). Here, the Court remanded the cases to BIA to correct the administrative record and to later decide issues on the corrected record. "...what is clear is that *Silva-Calderon* should not be prejudiced by the Board's [Respondent's] apparent clerical error." at p. 1136.

The quality of transcripts, the delay in rendering a decision, and the legal quality of BIA decisions have been attacked extensively and recently. For example, "the adjudication of these cases at the administrative level has fallen below the minimum standards of legal justice." *Benslimane v. Gonzales,* 430 F.3d 828, 830 (7th Cir. 2005) [reversed removal order where IJ refused to grant continuance when I-130 was pending...].

Judge Posner similarly stated in *Galina v. INS*, 213 F.3d 955, 958-59 (7th Cir. 2000), that the Board's analysis provokes questions as to "the adequacy"of considered evidence.

Petitioner's efforts to fully describe his continuance efforts have been rendered prejudicially impossible. That is because the defective hearing transcripts obviously permitted "no meaningful opportunity to be heard, " per *Nazarova v. INS,* 171 F.3d 478, 482 (7th Cir. 1999).

To obtain a reversal based on a Due Process violation standard, it is clear that among various bases, an applicant "must show that he or she was prejudiced by the Trial Judge's refusal to hear Petitioner's testimony." Petitioner's testimony that he sought to introduce (and did introduce, but rendered "indiscernible," per affidavit reference, *infra,* Pet. App. 107-16a and 117a-118a. had the potential for affecting the outcome of...deportation proceedings." *Kerciku v. INS,* 314 F.3d 913, 918 (7th Cir. 2003) (quoting *Podio v. INS*, 153 F.3d 505, 511 (7th Cir. 1998). "Whether the applicant will ultimately succeed on his or her application is not the point - - the critical issue is whether the applicant received a "fair" hearing. *Id* at

918. Applying this rule, this Court in *Kerciku, Id.* may well confirm that an applicant was "certainly prejudiced" particularly when "whole chunks of oral testimony" that would support the [Petitioner's] claims, at p. 918 of *Kerciku, Id.* were not considered in the case at bar, due to "indiscernible" hearing transcripts.

In short, an evaluation of the record as a whole establishes that Petitioner was denied his right to have "a meaningful opportunity to be heard," per Judge Ripple, in *Rodriguez-Galicia v. Gonzales* 422 F.3d 529, 538 (7th Circuit 2005), citing *Nazarova v. INS*, 171 F.3d, 478, 482 (6th Cir. 1999), also citing *Kerciku*.

There is no question that non-citizens in Mr. Al-Marbu's position are entitled to Due Process, see *Zadvydas v. Davis*, 533 U.S. 678, 693, 121 S.Ct. 2491, 150 L.Ed.2d 653 (2001).

This court should consider applying the holding in *Colmenar v. INS*, 210 F.3d 967 (9th Cir. 2000) where it was held that the petition for review need only show that the "Trial Judge's [BIA's] conduct potentially [affected] the outcome of the proceedings...[Mr. Al-Marbu] has met this burden. Therefore he was prejudiced by the lack of a full and fair hearing," at p. 972.

Concerning prejudice shown by Respondent's obvious failure to provide discernible hearing transcripts, the court is directed to the following graphic quotes from the initial hearing of April 2, 2002, from, believe it or not, Vol. I of the A.R. before

this Court in this case (quoting Vol. I, A.R. 000207-9, and Mr. Al-Marbu's undersigned attorney):

A. (Tr. Pg. 10, line 3) Q. That's the key to (indiscernible), Judge.

B. (Tr. Pg. 10, line 13) Q. The Affidavit from Mr. Al-Marbu shows (indiscernible). [All Vol. I, A.R. 000207]

C. (Tr. Pg. 12, line 1) A. And I think that (indiscernible) be modified by *matter of Valarde and Velez.* [Vol. I, A.R. 000209]

This Court, according to then Chief Judge Flaum, will not "automatically yield to the IJ's conclusions when they are drawn from insufficient or incomplete evidence." *Georgis v. Ashcroft*, 328 F.3d 962, 968 (7th Cir. 2003). In *Georgis,* this Court vacated the Removal Order and remanded for further proceedings, citing *Kerciku, Ibid* at p. 970.

As detailed in excerpts from the record and his affidavit, the deleted portions had a prejudicial impact on Petitioner's cases herein. The defects were obviously not harmless error. The many deletions were in obvious violation of the Court Reporter Act, ID, and thus clearly violated Petitioner's (and similarly situated litigants') Due Process Right to a fair trial. Petitioner, therefore, urges the Court's BRIGHT LINE decision on this all important issue, to confirm that a litigant is entitled to a verbatim transcript of his hearing in order to properly pursue his Due Process rights on appeal.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

Allan H. Bell, Esq.
Counsel of Record
Allan H. Bell and Associates
2022 Swift, Suite 202
North Kansas City, MO 64116
(816) 421-1430

Counsel for Petitioner

APPENDIX

APPENDIX A

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with
Fed. R. App. P. 32.1

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 04-2055, 05-2824

[Filed September 26, 2007]

AHMAD AL-MARBU,
Petitioner,

v.

PETER D. KEISLER,
Acting Attorney General of the United States,
Respondent.

Before

Hon. WILLIAM J. BAUER, *Circuit Judge*

Hon. KENNETH F. RIPPLE, *Circuit Judge*

Hon. TERENCE T. EVANS, *Circuit Judge*

Petition for Review of Orders
of the Board of Immigration Appeals.

No. A79-546-194

ORDER

An Immigration Judge ("IJ") determined that Ahmad Al-Marbu was removable and, on November 19, 2002, ordered that he voluntarily depart the United States within 110 days or face removal. Mr. Al-Marbu appealed that decision to the Board of Immigration Appeals ("BIA" or "Board"), which affirmed the IJ's order without opinion on March 24, 2004. Mr. Al-Marbu then filed a motion to reopen the Board's decision.

The Board denied that motion on May 24, 2005. Mr. Al-Marbu timely petitioned for review of each of the Board's orders, and we have consolidated them for our review.[1] For the reasons set forth in this order, we deny the petition.

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[1] For purposes of this order, we shall refer to the Certified Administrative Record in case No. 04-2055 (relating to the March 24, 2004 BIA decision) as A.R.I. We shall refer to the record in No. 05-2824 (relating to the May 24, 2005 decision denying the motion to reopen the Board's earlier decision) as A.R.II.

I

BACKGROUND

Mr. Al-Marbu is a native and citizen of Jordan who entered the United States as a non-immigrant visitor in December 2000, with permission to remain until June 7, 2001.

In May 2001, he married United States citizen Brenda Freeman[2] and, on June 26, 2001, she filed an immediate relative petition (I-130) on his behalf. For reasons not made clear by the record, on October 2, 2001, Ms. Freeman signed a fill-in-the-blank form letter to the immigration authorities indicating her intent to withdraw that petition; the same day, Mr. Al-Marbu was placed in removal proceedings and charged with overstaying his visitor's visa.

Appearing before the IJ on April 2, 2002, and apparently having reconciled with his wife, Mr. Al-Marbu denied removability. He asserted that, prior to his marriage, he had filed to change his status from visitor to student and that research of immigration records would reveal that he was in a valid non-immigrant status and had not overstayed; on questioning by the immigration trial attorney, however, he admitted that he had never received any approval of the change of status. At the request of the

---

[2] Ms. Freeman used the name Brenda Al-Marbu while married, but for ease of reading, we shall continue to refer to her by her maiden name.

Department of Homeland Security ("DHS"),[3] the IJ determined that Mr. Al-Marbu was removable. *See* A.R.I at 207. Mr. Al-Marbu then stated that he would be seeking relief from removal in the form of adjustment of status; his claimed eligibility for adjustment was based on a subsequent amended petition by Ms. Freeman apparently filed on Mr. Al-Marbu's behalf in November 2001. To allow adjudication of this pending petition, the IJ continued the proceedings, without objection from DHS counsel, to November 19, 2002. *See* A.R.I at 209.

On October 2, 2002, Mr. Al-Marbu and Ms. Freeman divorced. On November 7, 2002, Mr. Al-Marbu married his current wife, Ayan Mohamed. Ms. Mohamed was then a lawful permanent resident of the United States. On November 12, 2002, Ms. Mohamed filed a new I-130 petition for Mr. Al-Marbu. On that same date, Mr. Al-Marbu filed a written motion for a continuance of his next scheduled hearing before the IJ, then less than one week away, so that he could await the Service's adjudication of his *new* pending I-130.

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[3] At these early stages of Mr. Al-Marbu's immigration history, his proceedings involved the Immigration and Naturalization Service ("INS"). On March 1, 2003, the relevant functions of the INS were transferred to the Department of Homeland Security ("DHS") and divided among the United States Citizenship and Immigration Service ("USCIS") and other departments within DHS. *See* Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135. For ease of reading, we shall refer collectively to the benefits granting divisions of these agencies as the "Service" and the prosecutorial divisions as DHS.

Without a prior ruling on the motion, Mr. Al-Marbu appeared before the IJ as scheduled on November 19, 2002. The IJ denied Mr. Al-Marbu's request for a continuance and, in an oral decision, again found him removable. Specifically, the IJ found that Mr. Al-Marbu's primary basis for the requested continuance, that he was the beneficiary of a *pending* I-130 petition filed by his second wife, was not sufficient under BIA precedent to warrant a continuance. Having denied the continuance, the IJ found that the only relief for which Mr. Al-Marbu was eligible was voluntary departure, which he granted for a period of 110 days. *Id.* at 192-94. He also entered an alternate order of removal to Jordan. *Id.* at 194.

Mr. Al-Marbu appealed this order to the BIA. While his appeal was pending, he and his wife had a son, and, in November 2003, his wife became a United States citizen.[4] In February 2004, Ms. Mohamed filed a new visa petition for Mr. Al-Marbu based on his newly-acquired status as an immediate relative of a citizen.

One month later, on March 24, 2004, the BIA affirmed the IJ's November 2002 removal order without opinion and dismissed Mr. Al-Marbu's appeal. At that time, Mr. Al-Marbu was granted an additional 30-day period in which to depart the United States. He

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[4] Ms. Mohamed naturalized under the name of "Fartun Husen Hassan," and her final petition for Mr. Al-Marbu was filed in that name. A.R.II at 124. We shall refer to her as Ms. Mohamed, in order to conform to references to her throughout the administrative record.

filed with the Board an unsuccessful motion to reconsider its March 24th decision and simultaneously petitioned for review of the Board's March 24th order in this court. He also filed a separate motion for a stay of removal, which this court granted in December 2004.

On December 10, 2004, Ms. Mohamed's immediate relative petition for her husband was approved by the Service.

In April 2005, Mr. Al-Marbu also filed a motion to reopen the Board's March 24, 2004 order affirming the November 2002 order of the IJ. A.R.II at 98-106. He based his motion on new evidence, namely, that he was now the beneficiary of an *approved* immediate relative petition. On May 24, 2005, the Board denied his motion to reopen, citing the regulation that motions to reopen must be filed within 90 days of the final administrative order sought to be reopened. A.R.II at 82 (citing 8 C.F.R. § 1003.2(c)(2)). The order stated that there was no basis for excusing the delay under the circumstances. The Board went on to note, however, that Mr. Al-Marbu was ineligible for adjustment of status, in any event, because he had failed to depart during his authorized period of voluntary departure and was therefore subject to statutory penalties. *See id.* (citing 8 U.S.C. § 1229c(d)). The Board concluded that the stay of removal that Mr. Al-Marbu had obtained from this court did not toll the voluntary departure period or otherwise exempt him from these penalties. Mr. Al-Marbu filed his second petition for review in this court, now challenging the May 24, 2005 order of the Board denying his motion to reopen.

Mr. Al-Marbu also filed a new motion to reconsider with the Board, this time regarding the May 24, 2005 denial of his motion to reopen. He claimed that his case should be reopened to allow adjustment of status, or, in the alternative, to allow him to pursue an "S" visa in connection with his assistance to law enforcement in the investigation of a counterfeiting scheme. *See* A.R.II at 19; 8 U.S.C. § 1101(a)(15)(S)(i) (defining the non-immigrant visa category "S" to include certain aliens whom the Attorney General has determined are critical to the investigation or prosecution of a criminal enterprise). This motion to reconsider also was denied on August 3, 2005.

II

DISCUSSION

Mr. Al-Marbu has petitioned for review of the Board's March 24, 2004 affirmance of Mr. Al-Marbu's removal order and its May 24, 2005 order denying his motion to reopen the Board's March 24, 2004 decision. He contends principally that the IJ erred in denying his November 2002 request for a continuance in order to allow him to pursue adjustment of status through his marriage to Ms. Mohamed or to verify his lawful status under a student visa. Mr. Al-Marbu also makes a variety of due process claims relating to the conduct of his hearing, as well as claims of an entitlement to equitable tolling of his voluntary departure grant and to a request for relief in the form of an "S" visa, *see* 8 U.S.C. § 1101(a)(15)(S).

We address first Mr. Al-Marbu's primary contention in this appeal: that the IJ's order was

premised on an erroneous denial of his motion for a continuance. We have no jurisdiction to review the IJ's decision to deny a continuance under the circumstances of Mr. Al-Marbu's case. *See Ali v. Gonzales*, __ F.3d __, Nos. 06-3240 & 06-3879, 2007 WL 2684825 (7th Cir. Sept. 14, 2007).

We also agree with the Attorney General that we are without jurisdiction to consider Mr. Al-Marbu's additional request for relief in the form of an "S" visa. *See* 8 U.S.C. §§ 1101(a)(15)(S), 1252(a)(1); *Fonseca-Sanchez v. Gonzales*, 484 F.3d 439, 443 (7th Cir. 2007) (noting that this court's jurisdiction is limited to the review of final orders of removal and matters decided by the immigration courts "in the course of removal proceedings").

Finally, we have examined the other matters that Mr. Al-Marbu has raised in his brief and have determined that they are without merit. We note specifically that his motion to reopen was untimely filed and the record contains no justification for invoking the doctrine of equitable estoppel.

For the reasons stated in this order, we deny Mr. Al-Marbu's petition for review.

PETITION FOR REVIEW DENIED

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A79 546 194 - Chicago Date: MAY 24, 2005

In re: AHMAD ATIEH MOHAMMAD AL-MARBU

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT; Allen H. Bell, Esquire

ON BEHALF OF DHS: Karl V. Kozad
Deputy Chief Counsel

ORDER:

PER CURIAM. The respondent filed a motion to reopen on April 4, 2005. We dismissed the respondent's appeal on March 24, 2004, and declined to reconsider that decision on June 3, 2004. The motion has been filed out of time. *See* 8 C.F.R. § 1003.2(c)(2); *see also Matter of Velarde-Pacheco*, 23 I&N Dec. 253 (BIA 2002)(motion to reopen for

adjustment of status based on marriage contracted during proceedings may be granted under certain circumstances, but motion must be timely filed). The Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) opposes the pending motion, which will be denied.[1]

There is no basis for abrogating the motions deadline here. The respondent asserts that the motion deadline should be excused for seeking adjustment of status. He argues that the DHS delayed approval of the I-130 visa petition. A DHS processing delay is not a basis for excusing the motion deadline.

In any event, the respondent is ineligible for the relief sought, adjustment of status, based on his failure to depart under an order of volumtary departure, as the DHS aruges. Pursuant to section 240B(d) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(d), an alien who fails to depart following a grant of voluntary departure is statutorily barred from applying for certain forms of discretionary relief, including adjustment of status. *See Alimi v. Ashcroft*, 391 F.3d 888, 891-93 (7th Cir. 2004) (Court of Appeals has authority to extend vountary departure period, but in absence of specific request, not to include request for a stay of removal, voluntary departure period will expire); DHS Opposition (representing that respondent

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[1] On April 14, 2005, the respondent requested that he be granted a 30-day period to reply to the DHS opposition. As our records show that the respondent is detained, and the regulations do not provide for the filing of a reply in the motions context, *see* 8 C.F.R. § 1003.2(g)(3), the request is denied.

did not seek stay of voluntary departure before the Seventh Circuit Court of Appeals, where a petition for review of the Board's March 24, 2004, decision is pending).

The respondent was given notice of the consequences of failing to depart. *See* Board's Decision of March 24, 2004. As the respondent failed to comply with the order granting voluntary departure, we find him ineligible for the relief sought, adjustment of status under section 245 of the Act. The pending motion is, therefore, denied.

/s/
FOR THE BOARD

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A79-546-194 - Chicago Date: MAR 24, 2004

In re: AL-MARBU, AHMAD MOHAMMAD

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT; Bell, Allan H.

ON BEHALF OF DHS: Paula V. Davis,
Assistant District Counsel

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 1003.1(c)(4).

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the

statute, the alien is permitted to voluntarily depart from the United States, without expense to the Government, within 30 days from the date of this order or any extension beyond the time as may be granted by the district director. *See* section 240B(b) of the Immigration and Nationality Act: 8 C.F.R. §§ 1240.26(c), (f). In the event the alien fails to so depart, the alien shall be removed as provided in the Immigration Judge's order.

NOTICE: If the alien fails to depart the United States within the time period specified, or any extensions granted by the district director, the alien shall be subject to a civil penalty of not less than $1,000 and not more than $5,000, and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Immigration and Nationality Act. *See* section 240B(d) of the Act.

/s/ _____
FOR THE BOARD

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
CHICAGO, ILLINOIS

ALLAN H. BELL
ATTORNEY AT LAW
2022 SWIFT STREET, SUITE 202
N. KANSAS CITY MO 64116-3442

Date: Nov 19, 2002

File A79-546-194

In the Matter of: AL-MARBU, AHMAD ATIEH MOHAMMAD

* * *

X Enclosed is a copy of the order/decision of the Immigration Judge.

All papers filed with the Court shall be accompanied by proof of service upon opposing counsel.

Sincerely,

/s/
Immigration Court Clerk UL

cc: DAVIS, PAULA
9747 N. CONANT AVE.
KANSAS CITY, MO 64153
AA

IMMIGRATION COURT
Monroe Street, Suite 1900
Chicago, Illinois 60603

In the Matter of:
Ahmad Atieh Mohammad AL-MARBU
Respondent

CaseA# 79-546 194
IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision on 11-19-02. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

* * *

[X] Respondent's application for voluntary departure was granted until 3-10-03 ~~upon posting a bond in the amount of $____ with~~ an alternate order of removal to Jordan.

* * *

Date: 11-19-02

Appeal: [ ] WAIVED [X] RESERVED
BY: [X] Respondent [ ] INS [ ] Both
Apeal due date: 12-19-02

/s/_____
Immigration Judge

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
CHICAGO, ILLINOIS

File No. A 79-546 194 November 19, 2002

In the Matter of

AHMAD ATIEH MOHAMMAD AL-MARBU,)
)
Respondent)

CHARGE: Section 237 (a) (1) (B) of the Immigration and Nationality Act ... you have remained in the United States for a time longer than permitted.

APPLICATIONS: Voluntary Departure or alternatively Adjustment of Status under Section 245 of the Immigration and Nationality Act.

ON BEHALF OF RESPONDENT:
Allan H. Bell, Esquire
2022 Swift, Suite 202
North Kansas City, MO 64116

ON BEHALF OF SERVICE:
Paula V. Davis
Assistant District Counsel
9747 North Conant Avenue
Kansas City, MO 64153

ORAL DECISION OF THE IMMIGRATION JUDGE

Respondent is an adult married male, native and citizen of Jordan who last arrived in the United States on or about December 8, 2000 at Detroit, Michigan as a non-immigrant visitor with authorization to remain in the United States for a temporary period not to exceed June 7, 2001. The respondent was placed under proceedings by issuance of a charging document, to wit: a Notice to Appear on Form I-862. Respondent noticed to appear before the court on April 2, 2002, November 19, 2002. Respondent, through counsel, on April 2, 2002 admitted allegations one, two and three and four, denied allegation five, admitted allegation six and seven and denied allegation eight and denied the charge of removability. The charging document was entered in the record as Group Exhibit 1 along with the copy of the I-94 which is dated December 8, 2000, admitted as B-2 visitor for pleasure to June 7, 2001. Attached also is a withdrawal of an immediate relative petition by a Brenda Al-Marbu dated October 2, 2001 relating to her marriage to Ahmad Al-Marbu, the respondent in these proceedings. Also attached is a letter to the respondent advising him this matter was being forwarded to the immigration court for a hearing on the letter dated October 22, 2001, that's part of Group Exhibit 1. Along with that was a trasmittal letter dated October 22, 2001, with the documents listed above.

Respondent appeared before the court, Exhibit 2, on April 2, 2002 and November 19, 2002.

Based on the representations of the Service and the documentary evidence, the court found that the Service has established allegation five and also allegation eight by the documentary evidence and therefore established the charge of removability by evidence which is clear, convincing and unequivocal. *Woodby v. INS*, 385 U.S. 276 (1966).

The respondent appeared before the court today on November 19, 2002 via tele-video conferencing in which the audio portion of the proceedings were recorded and not the video. Respondent's attorney had heretofore submitted to the court Group Exhibit 4, a petition to the Nebraska Service Center of the Immigration and Naturalization Service at Lincoln, Nebraska for the processing of an I-130 with the attachments. *See*, Group Exhibit 4. Also the respondent submitted to court, Group Exhibit 5, a motion for continuance requesting the matter be continued in order for the I-130 application to be adjudicated by the processing center.

The Service nevertheless has indicated that this case falls within the Board of Immigration Appeals mandate under *Matter of Arthur*, citation omitted, in view of the fact that the marriage occurred subsequent to the issuance of the charging document and therefore would not be the basis for a continuance as contrary to *Matter of Garcia* in which if the marriage occurred prior to the issuance of the charging document, then the Board had indicated that a continuance would be in order.

The Service opposes the continuance under *Matter of Arthur* and the court therefore would have to apply

the standard as applicable by the Board of Appeals in its mandate under *Matter of Arthur*. Therefore the motion for a continuance has been denied.

Respondent is not eligible for any other reilef other than voluntary departure. The court had broached the question to the respondent whether or not he wished to file an application for asylum, for withholding of removal under Section 241 (b) (3) of the Act or relief under the Convention Against Torture. The respondent's attorney had indicated that they were not interested in making that application but would be interested in applying for voluntary departure.

The respondent had indicated to the court that he would take less than 120 days in order to not prejudice his right to taking an appeal to the Board of Immigration Appeals on the issue of whether or not the court erred in not granting the continuance and the other issues that the respondent wished to preserve for the record in his colloquy subsequently (indiscernible) the record.

The court finds that under these circumtances that the respondent's only relief is voluntary departure and therefore the court will grant the application for 110 days or to March 10, 2003 or any extension that the District Director may direct under these circumstances. The Service is not opposed to the granting of voluntary departure. Therefore the court will enter the following order.

ORDER

Based on the findings of the court the court finds removability has been established as indicated above. Respondent has made an application for voluntary departure and in the alternative for adjustment of status under section 245.

IT IS HEREBY ORDERED that the respondent's request for a continuance is denied in view of the fact that the respondent does not have an I-130 approval for immediate relative and therefore is not eligible for adjustment of status under section 245 of the Immigration and Nationality Act.

IT IS FURTHER ORDERED that respondent be granted voluntary departure in lieu of removal without expense to the government on or before March 10, 2003 or any extension as may be granted by the District Director for the Immigration and Naturalization Service and under such conditions as the District Director may direct.

IT IS FURTHER ORDERED that if respondent fails to depart when and as required the above order shall be withdrawn without further notice or proceedings and the following shall thereupon become immediately effective: Respondent shall be removed from the United States to Jordan as named in the Notice to Appear.

IT IS FURTHER ORDERED that if the respondent fails to depart when and as required, if the respondent fails to appear before the Immigration Service for removal other than because of exceptional

circumstances beyond his control (such as serious illness of the alien or death of an immediate relative of the alien but not including less compelling circumstances) he will not be eligible for the following forms of relief for a period of 10 years after the date you are required to appear for removal: 1) voluntary departure as provided in Section 240B of the Immigration and Nationality Act; 2) cancellation of removal as provided in Section 240A of the Immigration and Nationality Act; and 3) adjustment of status or change of status as provided under Section 245, 248 or 249 of the Immigration and Nationality Act.

/s/
O. JOHN BRAHOS
Immigration Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Nos. 04-2055, 05-2824

[Filed March 26, 2008]

AHMAD AL-MARBU,)
)
Petitioner-Appellant,)
)
v.)
)
MICHAEL B. MUKASEY,)
)
Respondent-Appellee.)

Petition for Review of Orders of the Board of Immigration Appeals.
No. A79-546-194

Before

WILLIAM J. BAUER, *Circuit Judge*

KENNETH F. RIPPLE, *Circuit Judge*

TERENCE T. EVANS, *Circuit Judge*

Upon consideration of Petitioner-Appellant's petition for rehearing en banc, filed on January 16, 2008, no judge in active service has requested a vote thereon and the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing en banc is hereby DENIED.

APPENDIX F

8 U.S.C. § 1229a. Removal Proceedings

[INA § 240]

* * *

(b)(4) Alien's rights in proceeding

In proceedings under this section, under regulations of the Attorney General—

(A) the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien's choosing who is authorized to practice in such proceedings,

(B) the alien shall have a reasonable opportunity to examine the evidence against the alien, to present evidence on the alien's own behalf, and to cross0examin witnesses presented by the Government but these rights shall not entitle the alien to examine such national security information as the Government may proffer in opposition to the alien's admission to the United States or to an application by the alien for discretionary relief under this chapter, and

(C) a complete record shall be kept of all testimony and evidence produced at the proceeding.

* * *

8 U.S.C. § 1252. Judicial review of orders of removal

[INA § 242]

(a) Applicable provisions

(1) General orders of removal

Judicial review of a final order of removal (other than an order of removal without a hearing pursuant to section 1225 (b)(1) of this title) is governed only by chapter 158 of title 28, except as provided in subsection (b) of this section and except that the court may not order the taking of additional evidence under section 2347(c) of such title.

(2) Matters not subject to judicial review

(A) Review relating to section 1225 (b)(1)

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to review—

> (i) except as provided in subsection (e) of this section, any individual determination or to entertain any other cause or claim arising from or relating to the implementation or operation of an order of removal pursuant to section 1225 (b)(1) of this title,

(ii) except as provided in subsection (e) of this section, a decision by the Attorney General to invoke the provisions of such section,

(iii) the application of such section to individual aliens, including the determination made under section 1225 (b)(1)(B) of this title, or

(iv) except as provided in subsection (e) of this section, procedures and policies adopted by the Attorney General to implement the provisions of section 1225 (b)(1) of this title.

(B) Denials of discretionary relief

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review—

(i) any judgment regarding the granting of relief under section 1182 (h), 1182 (i), 1229b, 1229c, or 1255 of this title, or

(ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the

Secretary of Homeland Security, other than the granting of relief under section 1158 (a) of this title.

(C) Orders against criminal aliens

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, and except as provided in subparagraph (D), no court shall have jurisdiction to review any final order of removal against an alien who is removable by reason of having committed a criminal offense covered in section 1182 (a)(2) or 1227 (a)(2)(A)(iii), (B), (C), or (D) of this title, or any offense covered by section 1227 (a)(2)(A)(ii) of this title for which both predicate offenses are, without regard to their date of commission, otherwise covered by section 1227 (a)(2)(A)(i) of this title.

(D) Judicial review of certain legal claims

Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

(3) Treatment of certain decisions

No alien shall have a right to appeal from a decision of an immigration judge which is based solely

on a certification described in section 1229a (c)(1)(B) of this title.

(4) Claims under the United Nations Convention

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of any cause or claim under the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman, or Degrading Treatment or Punishment, except as provided in subsection (e) of this section.

(5) Exclusive means of review

Notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, a petition for review filed with an appropriate court of appeals in accordance with this section shall be the sole and exclusive means for judicial review of an order of removal entered or issued under any provision of this chapter, except as provided in subsection (e) of this section. For purposes of this chapter, in every provision that limits or eliminates judicial review or jurisdiction to review, the terms "judicial review" and "jurisdiction to review" include habeas corpus review pursuant to section 2241 of title 28, or any other habeas corpus provision, sections 1361 and 1651 of

such title, and review pursuant to any other provision of law (statutory or nonstatutory).

(b) Requirements for review of orders of removal

With respect to review of an order of removal under subsection (a)(1) of this section, the following requirements apply:

(1) Deadline

The petition for review must be filed not later than 30 days after the date of the final order of removal.

(2) Venue and forms

The petition for review shall be filed with the court of appeals for the judicial circuit in which the immigration judge completed the proceedings. The record and briefs do not have to be printed. The court of appeals shall review the proceeding on a typewritten record and on typewritten briefs.

(3) Service

(A) In general

The respondent is the Attorney General. The petition shall be served on the Attorney General and on the officer or employee of the Service in charge of the Service district in which the final order of removal under section 1229a of this title was entered.

(B) Stay of order

Service of the petition on the officer or employee does not stay the removal of an alien pending the court's decision on the petition, unless the court orders otherwise.

(C) Alien's brief

The alien shall serve and file a brief in connection with a petition for judicial review not later than 40 days after the date on which the administrative record is available, and may serve and file a reply brief not later than 14 days after service of the brief of the Attorney General, and the court may not extend these deadlines except upon motion for good cause shown. If an alien fails to file a brief within the time provided in this paragraph, the court shall dismiss the appeal unless a manifest injustice would result.

(4) Scope and standard for review

Except as provided in paragraph (5)(B)—

(A) the court of appeals shall decide the petition only on the administrative record on which the order of removal is based,

(B) the administrative findings of fact are conclusive unless any reasonable adjudicator would be compelled to conclude to the contrary,

(C) a decision that an alien is not eligible for admission to the United States is conclusive unless manifestly contrary to law, and

(D) the Attorney General's discretionary judgment whether to grant relief under section 1158 (a) of this title shall be conclusive unless manifestly contrary to the law and an abuse of discretion.

No court shall reverse a determination made by a trier of fact with respect to the availability of corroborating evidence, as described in section 1158 (b)(1)(B), 1229a (c)(4)(B), or 1231 (b)(3)(C) of this title, unless the court finds, pursuant to subsection (b)(4)(B) of this section, that a reasonable trier of fact is compelled to conclude that such corroborating evidence is unavailable.

(5) Treatment of nationality claims

(A) Court determination if no issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds from the pleadings and affidavits that no genuine issue of material fact about the petitioner's nationality is presented, the court shall decide the nationality claim.

(B) Transfer if issue of fact

If the petitioner claims to be a national of the United States and the court of appeals finds that a genuine issue of material fact about the petitioner's nationality is presented, the court shall transfer the proceeding to the district court of the United States for the judicial district in which the petitioner resides for a new hearing on the nationality claim and a decision on that claim as if an action had been brought in the district court under section 2201 of title 28.

(C) Limitation on determination

The petitioner may have such nationality claim decided only as provided in this paragraph.

(6) Consolidation with review of motions to reopen or reconsider

When a petitioner seeks review of an order under this section, any review sought of a motion to reopen or reconsider the order shall be consolidated with the review of the order.

(7) Challenge to validity of orders in certain criminal proceedings

(A) In general

If the validity of an order of removal has not been judicially decided, a defendant in a criminal proceeding charged with violating section 1253 (a) of this title may challenge the validity of the order in the criminal proceeding only by filing a separate motion before trial. The district court, without a jury, shall decide the motion before trial.

(B) Claims of United States nationality

If the defendant claims in the motion to be a national of the United States and the district court finds that—

(i) no genuine issue of material fact about the defendant's nationality is presented, the court shall decide the motion only on the

administrative record on which the removal order is based and the administrative findings of fact are conclusive if supported by reasonable, substantial, and probative evidence on the record considered as a whole; or

(ii) a genuine issue of material fact about the defendant's nationality is presented, the court shall hold a new hearing on the nationality claim and decide that claim as if an action had been brought under section 2201 of title 28.

The defendant may have such nationality claim decided only as provided in this subparagraph.

(C) Consequence of invalidation

If the district court rules that the removal order is invalid, the court shall dismiss the indictment for violation of section 1253 (a) of this title. The United States Government may appeal the dismissal to the court of appeals for the appropriate circuit within 30 days after the date of the dismissal.

(D) Limitation on filing petitions for review

The defendant in a criminal proceeding under section 1253 (a) of this title may not file a petition for review under subsection (a) of this section during the criminal proceeding.

(8) Construction

This subsection—

(A) does not prevent the Attorney General, after a final order of removal has been issued, from detaining the alien under section 1231 (a) of this title;

(B) does not relieve the alien from complying with section 1231 (a)(4) of this title and section 1253 (g)[1] of this title; and

(C) does not require the Attorney General to defer removal of the alien.

(9) Consolidation of questions for judicial review

Judicial review of all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien from the United States under this subchapter shall be available only in judicial review of a final order under this section. Except as otherwise provided in this section, no court shall have jurisdiction, by habeas corpus under section 2241 of title 28 or any other habeas corpus provision, by section 1361 or 1651 of such title, or by any other provision of law (statutory or nonstatutory), to review such an order or such questions of law or fact.

(c) Requirements for petition

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[1] See References in Text note below.

A petition for review or for habeas corpus of an order of removal—

(1) shall attach a copy of such order, and

(2) shall state whether a court has upheld the validity of the order, and, if so, shall state the name of the court, the date of the court's ruling, and the kind of proceeding.

(d) Review of final orders

A court may review a final order of removal only if—

(1) the alien has exhausted all administrative remedies available to the alien as of right, and

(2) another court has not decided the validity of the order, unless the reviewing court finds that the petition presents grounds that could not have been presented in the prior judicial proceeding or that the remedy provided by the prior proceeding was inadequate or ineffective to test the validity of the order.

(e) Judicial review of orders under section 1225 (b)(1)

(1) Limitations on relief

Without regard to the nature of the action or claim and without regard to the identity of the party or parties bringing the action, no court may—

(A) enter declaratory, injunctive, or other equitable relief in any action pertaining to an order to exclude an alien in accordance with section 1225 (b)(1) of this title except as specifically authorized in a subsequent paragraph of this subsection, or

(B) certify a class under Rule 23 of the Federal Rules of Civil Procedure in any action for which judicial review is authorized under a subsequent paragraph of this subsection.

(2) Habeas corpus proceedings

Judicial review of any determination made under section 1225 (b)(1) of this title is available in habeas corpus proceedings, but shall be limited to determinations of—

(A) whether the petitioner is an alien,

(B) whether the petitioner was ordered removed under such section, and

(C) whether the petitioner can prove by a preponderance of the evidence that the petitioner is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, such status not having been terminated, and is entitled to such further inquiry as prescribed by the Attorney General pursuant to section 1225 (b)(1)(C) of this title.

(3) Challenges on validity of the system

(A) In general

Judicial review of determinations under section 1225 (b) of this title and its implementation is available in an action instituted in the United States District Court for the District of Columbia, but shall be limited to determinations of—

> (i) whether such section, or any regulation issued to implement such section, is constitutional; or
>
> (ii) whether such a regulation, or a written policy directive, written policy guideline, or written procedure issued by or under the authority of the Attorney General to implement such section, is not consistent with applicable provisions of this subchapter or is otherwise in violation of law.

(B) Deadlines for bringing actions

Any action instituted under this paragraph must be filed no later than 60 days after the date the challenged section, regulation, directive, guideline, or procedure described in clause (i) or (ii) of subparagraph (A) is first implemented.

(C) Notice of appeal

A notice of appeal of an order issued by the District Court under this paragraph may be filed not later than 30 days after the date of issuance of such order.

(D) Expeditious consideration of cases

It shall be the duty of the District Court, the Court of Appeals, and the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any case considered under this paragraph.

(4) Decision

In any case where the court determines that the petitioner—

(A) is an alien who was not ordered removed under section 1225 (b)(1) of this title, or

(B) has demonstrated by a preponderance of the evidence that the alien is an alien lawfully admitted for permanent residence, has been admitted as a refugee under section 1157 of this title, or has been granted asylum under section 1158 of this title, the court may order no remedy or relief other than to require that the petitioner be provided a hearing in accordance with section 1229a of this title. Any alien who is provided a hearing under section 1229a of this title pursuant to this paragraph may thereafter obtain judicial review of any resulting final order of removal pursuant to subsection (a)(1) of this section.

(5) Scope of inquiry

In determining whether an alien has been ordered removed under section 1225 (b)(1) of this title, the court's inquiry shall be limited to whether such an order in fact was issued and whether it relates to the petitioner. There shall be no review of whether the

alien is actually inadmissible or entitled to any relief from removal.

(f) Limit on injunctive relief

(1) In general

Regardless of the nature of the action or claim or of the identity of the party or parties bringing the action, no court (other than the Supreme Court) shall have jurisdiction or authority to enjoin or restrain the operation of the provisions of part IV of this subchapter, as amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, other than with respect to the application of such provisions to an individual alien against whom proceedings under such part have been initiated.

(2) Particular cases

Notwithstanding any other provision of law, no court shall enjoin the removal of any alien pursuant to a final order under this section unless the alien shows by clear and convincing evidence that the entry or execution of such order is prohibited as a matter of law.

(g) Exclusive jurisdiction

Except as provided in this section and notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of title 28, or any other habeas corpus provision, and sections 1361 and 1651 of such title, no court shall have jurisdiction to hear any cause or claim by or on behalf of any alien

arising from the decision or action by the Attorney General to commence proceedings, adjudicate cases, or execute removal orders against any alien under this chapter.

(June 27, 1952, c. 477, Title II, ch. 5, § 242, 66 Stat. 208; Sept. 3, 1954, c. 1263, § 17, 68 Stat. 1232; Dec. 29, 1981, Pub.L. 97-116, § 18(h)(1), 95 Stat. 1620; Oct. 12, 1984, Pub.L. 98-473, Title II, § 220(b), 98 Stat. 2028; Nov. 6, 1986, Pub.L. 99-603, Title VII, § 701, 100 Stat. 3445; Oct. 24, 1988, Pub.L. 100-525, § 9(n) 102 Stat. 2620; Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7343(a), 102 Stat. 4470; Nov. 29, 1990, Pub.L. 101-649, Title V, §§ 504(a), 545(e), Title VI, § 603(b)(2), 104 Stat. 5049, 5066, 5085; Dec. 12, 1991, Pub.L. 102-232, Title III, §§ 306(a)(4), (c)(7), 307(m)(2), 309(b)(9), 105 Stat. 1751, 1753, 1757, 1759; Sept. 13, 1994, Pub.L. 103-322, Title II, § 20301(a), Title XIII, § 130001(a), 108 Stat. 1823, 2023; Oct. 25, 1994, Pub.L. 103-416, Title II, §§ 219(h), 224(b), 108 Stat. 4317, 4324; Apr. 24, 1996, Pub.L. 104-132, Title IV, §§ 436(a), (b)(1), 438(a), 440(c), (h), 110 Stat. 1275, 1277, 1279; Sept. 30, 1996, Pub.L. 104-208, Div. C, Title III, §§ 306(a), (d), 308(g)(10)(H), 371(b)(6), 110 Stat. 3009-607, 3009-612, 3009-625, 3009-645; May 11, 2005, Pub.L. 109-13, Div. B, Title I, §§ 101(c), (f), 106(a), 119 Stat. 305, 310.)

Historical and Statutory Notes

References in Text

This chapter, referred to in text, was in the original, "this Act", meaning Act June 27, 1952, c. 477, 66 Stat. 163, as amended, known as the Immigration and Nationality Act, which is classified principally to

this chapter. For complete classification of this Act to the Code, see Tables.

Section 1253 of this title, referred to in subsec. (b)(8)(B), was amended by Pub.L. 104-208, div. C, title III, § 307(a), Sept. 30, 1996, 110 Stat. 3009-612, and as so amended, no longer contains a subsec. (g). Provisions similar to those contained in former 8 U.S.C.A. § 1253(g) are now contained in 8 U.S.C.A. § 1253(d).

Rule 23 of the Federal Rules of Civil Procedure, referred to in subsec. (e)(1)(B), is set out in Title 28, Federal Rules of Civil Procedure, 28 U.S.C.A.

The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, referred to in subsec. (f)(1), is Pub.L. 104-208, Div. C, Sept. 30, 1996, 110 Stat. 3009-546. For complete classification of this Act to the Code, see section 1(a) of Div. C of Pub.L. 104-208, set out as a Short Title of 1996 Amendments note under section 1101 of this title and Tables.

Codifications

Amendment by Pub.L. 98-473 has been executed by adding "supervised release," following "Parole," as the probable intent of Congress, notwithstanding directory language of Pub.L. 98-473 which required that "supervised release," be added to text following "parole,".

Amendment pursuant to section 306(a)(4) of Pub.L. 102-232 was executed to subsec. (a)(2)(B) of this section as the probable intent of Congress,

notwithstanding directory language of section 306(a)(4) of Pub.L. 102-232, which directed that the amendment be executed to subsec. (a)(5)(B) of this section. Subsec. (a) consists of only pars. (1) and (2).

Effective and Applicability Provisions

2005 Acts. Pub.L. 109-13, Div. B, Title I, § 106(b), May 11, 2005, 119 Stat. 311, provided that: "The amendments made by subsection (a) [amending this section] shall take effect upon the date of the enactment of this division [May 11, 2005] and shall apply to cases in which the final administrative order of removal, deportation, or exclusion was issued before, on, or after the date of the enactment of this division [May 11, 2005]."

Pub.L. 109-13, Div. B, Title I, § 101(h)(3), (4), May 11, 2005, 119 Stat. 305, provided that:

"(3) The amendment made by subsection (e) [amending subsec. (b)(4) of this section] shall take effect on the date of the enactment of this division [May 11, 2005] and shall apply to all cases in which the final administrative removal order is or was issued before, on, or after such date.

"(4) The amendments made by subsection (f) [amending subsec. (a)(2)(B) of this section] shall take effect on the date of the enactment of this division [May 11, 2005] and shall apply to all cases pending before any court on or after such date."

1996 Acts. Amendment by section 308(g)(10)(H) of Div. C of Pub.L. 104-208 effective, with certain

exceptions and subject to certain transitional rules, on the first day of the first month beginning more than 180 days after Sept. 30, 1996, see section 309 of Div. C of Pub.L. 104-208, set out as a note under section 1101 of this title.

Section 306(c) of Div. C of Pub.L. 104-208, as amended Pub.L. 104-302, § 2(1), Oct. 11, 1996, 110 Stat. 3657, provided that:

"(1) In general.--Subject to paragraph (2), the amendments made by subsections (a) and (b) [amending this section and section 1234 of this title and repealing section 1105a of this title] shall apply as provided under section 309 [section 309 of Pub.L. 104-208, set out as a note under section 1101 of this title], except that subsection (g) of section 242 of the Immigration and Nationality Act (as added by subsection (a)) [subsec. (g) of this section], shall apply without limitation to claims arising from all past, pending, or future exclusion, deportation, or removal proceedings under such Act [this chapter].

"(2) Limitation.--Paragraph (1) shall not be considered to invalidate or to require the reconsideration of any judgment or order entered under section 106 of the Immigration and Nationality Act, as amended by section 440 of Public Law 104-132 [former section 1105a of this title]."

Section 306(d) of Div. C of Pub.L. 104-208 provided in part that the amendment by that section to section 440(c) and (h) of Pub.L. 104-132 [which amended subsecs. (a)(2) and (c) of this section, respectively] is

effective as if included in the enactment of Pub.L. 104-132, which was approved Apr. 24, 1996.

Amendment by section 371(b)(6) of Div. C of Pub.L. 104-208 effective Sept. 30, 1996, see section 371(d)(1) of Div. C of Pub.L. 104-208, set out as a note under section 1101 of this title.

Section 436(b)(3) of Pub.L. 104-132 provided that: "The amendments made by this subsection [amending subsec. (i) of this section and provisions set out as a note under section 1101 of this title] shall take effect as if included in the enactment of the Immigration and Nationality Technical Corrections Act of 1994 (Public Law 103-416) [Approved Oct. 25, 1994]."

1994 Acts. Amendment by section 219 of Pub.L. 103-416 effective as if included in the enactment of the Immigration Act of 1990, Pub.L. 101-649, 104 Stat. 4978, which was approved Nov. 29, 1990, except as otherwise specifically provided, see section 219(dd) of Pub.L. 103-416, set out as a note under section 1101 of this title.

Section 224(c) of Pub.L. 103-416 provided that: "The amendments made by this section [amending this section and section 1252a of this title] shall apply to all aliens whose adjudication of guilt or guilty plea is entered in the record after the date of enactment of this Act [Oct. 25, 1994]."

Section 20301(b) of Pub.L. 103-322 provided that: "The amendment made by subsection (a) [amending this section] shall take effect October 1, 1994."

1991 Acts. Amendments by sections 302 through 308 of Pub.L. 102-232, except as otherwise specifically provided, effective as if included in the enactment of Pub.L. 101-649, see section 310(1) of Pub.L. 102-232, set out as a note under section 1101 of this title.

Section 307(m) of Pub.L. 102-232 provided in part that the amendments made by such section [amending subsec. (e) of this section and the directory language of section 603(b) of Pub.L. 101-649] are effective as if included in section 603(b) of the Immigration Act of 1990 [Pub.L. 101-649], which was approved Nov. 29, 1990, see also section 602(d) of Pub.L. 101-649, set out as a note under section 1161 of this title.]

Amendment by section 309(b) of Pub.L. 102-232 effective Dec. 12, 1991, see section 310(2) of Pub.L. 103-232, as amended, set out as a note under section 1101 of this title.

1990 Acts. Section 504(c) of Pub.L. 101-649 provided that: "The amendments made by this section [amending subsec. (a)(2) of this section and enacting section 1226(e) of this Title] shall take effect on the date of the enactment of this Act [Nov. 29, 1990]."

Amendment by section 545(e) of Pub.L. 101-649 effective on a date specified by Attorney General in certification to Congress of establishment of central address file system (described in section 1252b(a)(4) of this title), which date may not be earlier than 6 months after date of such certification, see section 545(g)(1) of Pub.L. 101-649, set out as a note under section 1252b of this title.

Amendment by section 603(b)(2) of Pub.L. 101-649 not applicable to deportation proceedings for which notice has been provided to the alien before Mar. 1, 1991, see section 602(d) of Pub.L. 101-649, set out as a note under section 1161 of this title.

1988 Acts. Section 7343(c) of Pub.L. 100-690 provided that: "The amendments made by subsections (a) [amending subsec. (a) of this section] and (b) [amending section 1254(e) of this title] shall apply to any alien who has been convicted, on or after the date of the enactment of this Act [Nov. 18, 1988], of an aggravated felony."

1984 Acts. Amendment by Pub.L. 98-473 effective on the first day of first calendar month beginning thirty six months after Oct. 12, 1984, applicable only to offenses committed after taking effect of sections 211 to 239 of Pub.L. 98-473, and except as otherwise provided for therein, see section 235 of Pub.L. 98-473, as amended, set out as a note under section 3551 of Title 18, Crimes and Criminal Procedure.

1981 Acts. Amendment by Pub.L. 97-116 effective on Dec. 29, 1981, see section 21(a) of Pub.L. 97-116, set out as a note under section 1101 of this title.

1952 Acts. Section effective 180 days after June 27, 1952, see § 407 of Act June 27, 1952, set out as a note under § 1101 of this title.

Severability of Provisions

If any provision of Div. C of Pub.L. 104-208 or the application of such provision to any person or

circumstances is held to be unconstitutional, the remainder of Div. C of Pub.L. 104-208 and the application of the provisions of Div. C of Pub.L. 104-208 to any person or circumstance not to be affected thereby, see section 1(e) of Pub.L. 104-208, set out as a note under section 1101 of this title.

Termination of Limitation

Pub.L. 103-322, Title II, § 20301(c), Sept. 13, 1994, 108 Stat. 1824, formerly classified as a note under this section, was transferred to 8 U.S.C.A. § 1231, and subsequently repealed by Pub.L. 109-162, Title XI, § 1172(c), Jan. 5, 2006, 119 Stat. 3123.

References to Order of Removal Deemed to Include Order of Exclusion and Deportation

For purposes of this chapter, any reference in law to an order of removal is deemed to include a reference to an order of exclusion and deportation or an order of deportation, see section 309(d)(2) of Pub.L. 104-208, set out in an Effective Date of 1996 Amendments note under section 1101 of this title.

Abolition of Immigration and Naturalization Service and Transfer of Functions

For abolition of Immigration and Naturalization Service, transfer of functions, and treatment of related references, see note set out under 8 U.S.C.A. § 1551.

Transfer of Cases

Pub.L. 109-13, Div. B, Title I, § 106(c), May 11, 2005, 119 Stat. 311, provided that: "If an alien's case, brought under section 2241 of title 28, United States Code, and challenging a final administrative order of removal, deportation, or exclusion, is pending in a district court on the date of the enactment of this division [May 11, 2005], then the district court shall transfer the case (or the part of the case that challenges the order of removal, deportation, or exclusion) to the court of appeals for the circuit in which a petition for review could have been properly filed under section 242(b)(2) of the Immigration and Nationality Act (8 U.S.C. 1252 [subsec. (b)(2) of this section]), as amended by this section, or under section 309(c)(4)(D) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1101 note). The court of appeals shall treat the transferred case as if it had been filed pursuant to a petition for review under such section 242, except that subsection (b)(1) of such section [subsec. (b)(1) of this section] shall not apply."

Transitional Rule Cases

Pub.L. 109-13, Div. B, Title I, § 106(d), May 11, 2005, 119 Stat. 311, provided that: "A petition for review filed under former section 106(a) of the Immigration and Nationality Act (as in effect before its repeal by section 306(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (8 U.S.C. 1252 note)) shall be treated as if it had been filed as a petition for review under section 242 of the Immigration and Nationality Act (8 U.S.C. 1252 [this section]), as amended by this section. Notwithstanding any other provision of law (statutory or nonstatutory),

including section 2241 of title 28, United States Code, or any other habeas corpus provision, and sections 1361 and 1651 of such title, such petition for review shall be the sole and exclusive means for judicial review of an order of deportation or exclusion."

Transition Period Custody Rules to Be Construed with Pub.L. 104-132

For provisions to take effect, in place of the amendment to subsec. (a) of this section by section 440(c) of Pub.L. 104-132, upon notification by the Attorney General, not later than 10 days after Sept. 30, 1996, that there is insufficient detention space and Immigration and Naturalization Service personnel available to carry out such amendments, such provisions to remain in effect for a 1-year period beginning on the date of such notification, with the possibility of an additional 1-year extension by the Attorney General, following which, section 1226(c) of this title, as amended by section 303 of Pub.L. 104-208, shall apply to individuals released after such periods, see section 303(b) of Pub.L. 104-208, set out as a Effective Date of 1996 Amendments note under section 1226 of this title.

Criminal Alien Tracking Center

Section 130002 of Pub.L. 103-322, as amended Pub.L. 104-132, Title IV, § 432, Apr. 24, 1996, 110 Stat. 1273; Pub.L. 104-208, Div. C, Title III, §§ 308(g)(5)(B), 326, 327, Sept. 30, 1996, 110 Stat. 3009-623, 3009-630, provided that:

"(a) Operation and purpose.--The Commissioner of Immigration and Naturalization shall, under the authority of section 236(d) of the Immigration and Nationality Act [section 1226(d) of this title] operate a criminal alien identification system. The criminal alien identification system shall be used to assist Federal, State, and local law enforcement agencies in identifying and locating aliens who may be subject to removal by reason of their conviction of aggravated felonies, subject to prosecution under section 275 of such Act [8 U.S.C.A. § 1325], not lawfully present in the United States, or otherwise removable. Such system shall include providing for recording of fingerprint records of aliens who have been previously arrested and removed into appropriate automated fingerprint identification systems.

"(b) Authorization of appropriations.--There are authorized to be appropriated to carry out this section [this note]--

"(1) $3,400,000 for fiscal year 1996; and
"(2) $5,000,000 for each of fiscal years 1997 through 2001."

[Amendment by section 308 of Pub.L. 104-208 to take effect on the first day of the first month beginning more than 180 days after the date of the enactment of Pub.L. 104-208, which was approved Sept. 30, 1996, subject to transitional provisions and supplemented by authority of the Attorney General to promulgate regulations, see section 309 of Div. C of Pub.L. 104-208, set out as a note under section 1101 of this title.]

Expanded Special Deportation Proceedings

Section 130007 of Pub.L. 103-322, as amended Pub.L. 104-208, Div. C, Title III, § 308(g)(5)(F), (10)(F), Title VI, § 671(a)(6), Sept. 30, 1996, 110 Stat. 3009-623, 3009-625, 3009-721, provided that:

"(a) In general.--Subject to the availability of appropriations, the Attorney General may expand the program authorized by section 238(a)(3) [formerly 242A(a)(3)] and 239(d) of the Immigration and Nationality Act [sections 1228(a)(3) (formerly 1252a(a)(3)) and 1229(d) of this title] to ensure that such aliens are immediately deportable upon their release from incarceration.

"(b) Detention and removal of criminal aliens.--Subject to the availability of appropriations, the Attorney General may--

"(1) construct or contract for the construction of 2 Immigration and Naturalization Service Processing Centers to detain criminal aliens; and

"(2) provide for the detention and removal of such aliens.

"(c) Report.--By September 30, 1996, and September 30, 1998 the Attorney General shall report to the Congress on the programs referred to in subsections (a) and (b). The report shall include an evaluation of the programs, an outcome-based measurement of performance, and an analysis of the cost effectiveness of the additional resources provided under this Act [Pub.L. 103-322, Sept. 13, 1994, 108

Stat. 1796. For classification, see Short Title note set out under section 13701 of Title 42, The Public Health and Welfare, and Tables.].

"(d) Authorization of appropriations.--There are authorized to be appropriated to carry out this section [this note]--

"(1) $55,000,000 for fiscal year 1995;
"(2) $54,000,000 for fiscal year 1996;
"(3) $49,000,000 for fiscal year 1997; and
"(4) $2,000,000 for fiscal year 1998."

[Amendment by section 308 of Pub.L. 104-208 to take effect on the first day of the first month beginning more than 180 days after the date of the enactment of Pub.L. 104-208, which was approved Sept. 30, 1996, subject to transitional provisions and supplemented by authority of the Attorney General to promulgate regulations, see section 309 of Div. C of Pub.L. 104-208, set out as a note under section 1101 of this title.]

[Amendment by section 671(a)(6) of Div. C of Pub.L. 104-208 effective as if included in the enactment of Pub.L. 103-322, which was approved Sept. 13, 1994, see section 671(a)(7) of Div. C of Pub.L. 104-208, set out as a note under section 1101 of this title.]

Authority to Accept Certain Assistance

Section 130008 of Pub.L. 103-322 provided that:

"(a) In general.--Subject to subsection (b) and notwithstanding any other provision of law, the

Attorney General, in the discretion of the Attorney General, may accept, hold, administer, and utilize gifts of property and services (which may not include cash assistance) from State and local governments for the purpose of assisting the Immigration and Naturalization Service in the transportation of deportable aliens who are arrested for misdemeanor or felony crimes under State or Federal law and who are either unlawfully within the United States or willing to submit to voluntary departure under safeguards. Any property acquired pursuant to this section [this note] shall be acquired in the name of the United States.

"(b) Limitation.--The Attorney General shall terminate or rescind the exercise of the authority under subsection (a) if the Attorney General determines that the exercise of such authority has resulted in discrimination by law enforcement officials on the basis of race, color, or national origin."

Regulations on Motions to Reopen and to Reconsider and on Administrative Appeals

Section 545(d) of Pub.L. 101-649 provided that: "Within 6 months after the date of the enactment of this Act [Nov. 29, 1990], the Attorney General shall issue regulations with respect to--

"(1) the period of time in which motions to reopen and to reconsider may be offered in deportation proceedings, which regulations include a limitation on the number of such motions that may be filed and a maximum time period for the filing of such motions; and

"(2) the time period for the filing of administrative appeals in deportation proceedings and for the filing of appellate and reply briefs, which regulations include a limitation on the number of administrative appeals that may be made, a maximum time period for the filing of such motions and briefs, the items to be included in the notice of appeal, and the consolidation of motions to reopen or to reconsider with the appeal of the order of deportation."

Cross References

Alien deported in pursuance of law, see 8 USCA § 1101(g).

Definition of the term--

Alien, see 8 USCA § 1101(a)(1).

Attorney General, see 8 USCA § 1101(a)(5).

Immigration laws, see 8 USCA § 1101(a)(17).

Immigration officer, see 8 USCA § 1101(a)(18).

National, see 8 USCA § 1101(a)(21).

Passport, see 8 USCA § 1101(a)(30).

United States, see 8 USCA § 1101(a)(38).

Habeas corpus, see 28 USCA § 2241 et seq.

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Article III, separation of powers and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996. M. Isabel Medina, 29 Connecticut L.R. 1525 (1997).

Deportation and the war on independence. Stephen H. Legomsky, 91 CNLLR 369 (2006).

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TITLE 28 – JUDICIARY AND JUDICIAL PROCEDURE
PART III – COURT OFFICERS AND EMPLOYEES
CHAPTER 49 – DISTRICT COURTS

28 U.S.C. § 753. Reporters

(a) Each district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the

District Court of the Virgin Islands shall appoint one or more court reporters.

The number of reporters shall be determined by the Judicial Conference of the United States.

The qualifications of such reporters shall be determined by standards formulated by the Judicial Conference. Each reporter shall take an oath faithfully to perform the duties of his office.

Each such court, with the approval of the Director of the Administrative Office of the United States Courts, may appoint additional reporters for temporary service not exceeding three months, when there is more reporting work in the district than can be performed promptly by the authorized number of reporters and the urgency is so great as to render it impracticable to obtain the approval of the Judicial Conference.

If any such court and the Judicial Conference are of the opinion that it is in the public interest that the duties of reporter should be combined with those of any other employee of the court, the Judicial Conference may authorize such a combination and fix the salary for the performance of the duties combined.

(b) Each session of the court and every other proceeding designated by rule or order of the court or by one of the judges shall be recorded verbatim by shorthand, mechanical means, electronic sound recording, or any other method, subject to regulations promulgated by the Judicial Conference and subject to the discretion and approval of the judge. The

regulations promulgated pursuant to the preceding sentence shall prescribe the types of electronic sound recording or other means which may be used. Proceedings to be recorded under this section include (1) all proceedings in criminal cases had in open court; (2) all proceedings in other cases had in open court unless the parties with the approval of the judge shall agree specifically to the contrary; and (3) such other proceedings as a judge of the court may direct or as may be required by rule or order of court as (!1) may be requested by any party to the proceeding.

The reporter or other individual designated to produce the record shall attach his official certificate to the original shorthand notes or other original records so taken and promptly file them with the clerk who shall preserve them in the public records of the court for not less than ten years.

The reporter or other individual designated to produce the record shall transcribe and certify such parts of the record of proceedings as may be required by any rule or order of court, including all arraignments, pleas, and proceedings in connection with the imposition of sentence in criminal cases unless they have been recorded by electronic sound recording as provided in this subsection and the original records so taken have been certified by him and filed with the clerk as provided in this subsection. He shall a1s.o transcribe and certify such other parts of the record of proceedings as may be required by rule or order of court. Upon the request of any party to any proceeding which has been so recorded who has agreed to pay the fee therefor, or of a judge of the court, the reporter or other individual designated to produce the

record shall promptly transcribe the original records of the requested parts of the proceedings and attach to the transcript his official certificate, and deliver the same to the-party or judge making the request.

The reporter or other designated individual shall promptly deliver to the clerk for the records of the court a certified copy of any transcript so made.

The transcript in any case certified by the reporter or other individual designated to produce the record shall be deemed prima facie a correct statement of the testimony taken and proceedings had. No transcripts of the proceedings of the court shall be considered as official except those made from the records certified by the reporter or other individual designated to produce the record.

The original notes or other original records and the copy of the transcript in the office of the clerk shall be open during office hours to inspection by any person without charge.

(c) The reporters shall be subject to the supervision of the appointing court and the Judicial Conference in the performance of their duties, including dealings with parties requesting transcripts.

* * *

8 C.F.R. §1003.29 Continuances

The Immigration Judge may grant a motion for continuance for good cause shown.

8 C.F.R. § 1003.36 Record of proceeding.

The Immigration Court shall create and control the Record of Proceeding.

8 C.F.R. § 1240.6 Postponement and adjournment of hearing.

After the commencement of the hearing, the immigration judge may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Service.

8 C.F.R. § 1240.9 Contents of record.

The hearing before the immigration judge, including the testimony, exhibits, applications, proffers, and requests, the immigration judge's decision, and all written orders, motions, appeals, briefs, and other papers filed in the proceedings shall constitute the record in the case. The hearing shall be recorded verbatim except for statements made off the record with the permission of the immigration judge. In his or her discretion, the immigration judge may exclude from the record any arguments made in connection with motions, applications, requests, or objections but in such even the person affect may submit a brief.

APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Case No. 06-2441

[Filed November 27, 2007]

MADHUMILIND N POTDAR, Petitioner,	)
v.	)
MICHAEL MUKASEY, ACTING ATTORNEY GENERAL OF THE UNITED STATES, Respondent.	)

PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC*

Argued February 28, 2007
Decided October 10, 2007

Petition for Rehearing with Suggestion for Rehearing *En Banc* Executive Office for Immigration Review U.S. Department of Justice

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PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

Concise Statement of the Issues
and their Importance
Basis of the Request for Rehearing

A rehearing is requested to permit this court to reconsider whether it lacked jurisdiction under §242 (a)(2)(B)(ii), 8 U.S.C.S. § 1252(a)(2)(B)(ii) to review a denial of a continuance requested by the Petitioner to enable him to pursue an application for adjustment of status under §245(i), 8 U.S.C. 1255(i), that was pending with the office of Citizenship and Immigration Services (hereinafter "USCIS"). This court concluded that it lacked jurisdiction under Ali v. Gonzales, 502 F.3d 659 (7th Cir. 2007). In Ali, this court held that §242(a)(2)(B)(ii), 8 U.S.C.S. § 1252(a)(2)(B)(i) eliminates judicial review of any judgment regarding the granting of relief under *8* U.S.C.S. §§ 1182(h), 1182(i), 1229b, 1229c, or 1255 and therefore, the choices leading up to any decision to grant or deny such relief, including a decision to deny a continuance. 502 F.3d at *13-4. Any opinion on the propriety of any step that leads to an unreviewable decision is nothing more than an advisory opinion.

In the reopened exclusion proceedings, Petitioner sought to continue the proceedings while his application for adjustment of status was in process with USCIS. Factually, Ali is distinguishable from the case at bar and falls within the exceptions of Subhan v. Ashcroft, 383 F.3d 591 (7th Cir. 2004); Ahmed v. Gonzales, 465 F.3d 806 (7th Cir. 2006); and Benslimane

v. Gonzales, 430 F.3d 828 (7th Cir. 2005), none of which have been overruled by Ali v. Gonzales, *supra*.

Moreover, there are strong policy reasons for granting rehearing in this case because Petitioner is pinioned between three conflicting Immigration Acts, to wit: (1) §236, 8 U.S.C. §1226, of the Immigration Reform and Control Act of 1990, upon which the exclusion proceedings were predicated and which did not permit an excludible alien to adjust status before an immigration judge; (2) §101(a)(13)(B), 8 U.S.C. §1101(a)(13)(B) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (hereinafter "IIRIRA"), Pub. Law No. 104-208, 3009-546, which replaced the "entry" doctrine with "admission" so that an "arriving alien" paroled into the United States was not admitted, and under the Attorney General's former regulation, 8 C.F.R. §1245.1(c)(8), could not obtain adjustment of status and, (3) §245(i), 8 U.S.C. §1255(i), created by the LIFE ACT, Pub. Law No. 106-554, Act of December 21, 2000, that enabled aliens illegally in the United States to adjust their status if they were "physically present" in the United States (including those who had entered without inspection), who were the beneficiaries of approved alien labor certifications or visa petitions filed prior to April 30, 2001. Petitioner's efforts at maintaining "physical presence" in the United States to avail himself of relief for which he is statutorily qualified underscores this request for rehearing.

SUMMARY OF FACTS

Petitioner's motion to reopen his exclusion proceedings was filed on August 23, 2003. By then

Petitioner's employer had obtained an approved alien labor

[missing pages 3-4]

ARGUMENT

I

This court has jurisdiction to review decisions denying a continuance entered by an immigration judge and the Board for nondiscretionary reasons regarding matters not within their discretionary authority as described in § 12 52(a)(2)(B)(i) and §1252(a)(2)(B)(ii), and which raise errors of law and due process issues that are amenable to judicial review under 8 U.S.C. §1252(a)(2)(D).

In Ali v. Gonzales, supra, the alien sought a continuance in the hopes of qualifying for adjustment of status as an immediate relative parent, when his son became a naturalized citizen, and when he filed a visa petition on Ali's behelf, which, if approved, would make Ali eligible for adjustment of status in the removal proceedings. The problem was that the son's naturalization petition had been denied for lack of prosecution and the prospect of Ali's eligibility for adjustment of status was in the far distant future. The immigration judge denied the continuance and the Board affirmed. This court concluded:

> Adjustment of status determinations are unreviewable under §1252(a)(2)(B)(i); the IJ's

> continuance decision is interim to Ali's contemplated adjustment of status application, and interim orders entered along the road to an unreviewable final order are themselves unreviewable.
>
> 502 F.3d *4-*5

Petitioner's case presents a different scenario from that which concerned the court in Ali and fits the exception set forth in Subhan, *supra*. Petitioner's request for a continuance was not directed to his eligibility for adjustment of status which the immigration judge could not grant. His reason for a continuance was to postpone the exclusion order to enable his application for adjustment of status to be considered by USCIS. In reopened proceedings, the immigration judge and the Board denied his requests for a continuance and/or for termination of the proceedings. Unlike Ali v. Gonzales, *supra,* the denial of Petitioner's request for a continuance was not an interim order leading to an unreviewable decision to grant or deny discretionary relief. Petitioner was pursuing his adjustment application elsewhere. The end game in this case was not to delay proceedings to qualify for relief that the immigration judge could grant at some future, undetermined time, but to preserve Petitioner's status quo as an alien physically present in the United States for purposes of maintaining §245(i) eligibility. See Subhan, *supra,* 383 F. 3d at 595 (noting that, unlike most grounds for adjustment of status, adjustments based on employment, like those based on marriage to a U.S. citizen, cannot be pursued once the alien has been removed from the United States). Other than the

obstacle of an exclusion order, Petitioner was qualified in all other respects to file for adjustment of status and had done so.

As in Subhan, the reasons given by the Immigration court and the Board were not responsive to Petitioner's motion. Refusing to continue the case to await the outcome of Petitioner's applications and refusing to terminate the proceedings in light of evidence that Petitioner had returned with advance parole, the Board left the exclusion order intact and, by its existence nullified Petitioner's opportunity to avail himself of the statutory benefits of §245(i). As this court in Subhan concluded, it is inconceivable that Congress intended §1252(a)(2)(B)(ii) to place beyond judicial review decisions by the immigration authorities that nullified the benefits of §245(i). 383 F.3d 594.

Likewise, in Benslimane v. Gonzales, 430 F.3d 828 (7th Cir. 2005), where an alien had married to a U.S. citizen, who had filed a visa petition, Form I-103, which had not been approved during the pendency of removal proceedings, the judge denied a third continuance to enable the I-103 petition to be adjudicated by USCIS. Had the petition be approved in the course of removal proceedings, Benslimane would have qualified for adjustment of status. Because his lawyer did not file an application for adjustment of status with the immigration court as the judge commanded, in the belief that until the visa petition was approved, Benslimane was ineligible for adjustment of status, the judge denied a continuance and the case concluded by the entry of a removal order. 430 F.3d at 831. Judge Posner stated:

> An immigration judge cannot be permitted, by arbitrarily denying a motion for a continuance without which the alien cannot establish a ground on which Congress has determined that he is eligible to seek to remain in this country, 8 U.S.C. §§1151(b)(2)(A)(i), 1255(a), to thwart the congressional design. The Board of Immigration Appeals so recognized in In re Garcia, supra, 16 I. & N. Dec. at 654: "We have examined our policy with respect to the disposition of motions to reopen for consideration of adjustment applications based upon as yet unadjudicated visa petitions in light of the present regulation permitting simultaneous filing. In order to give what we consider to be appropriate effect to the simultaneous filing provisions of *8 C.F.R. 245(a)(2)*, as amended, we shall hereafter generally reopen the deportation proceedings in such cases unless clear ineligibility is apparent in the record."
>
> 430 F.3d at 833

Appreciating the bureaucratic intricacies aliens face in obtaining residency in the United States, Judge Posner vowed that "[wle are not required to permit Benslimane to be ground to bits in the bureaucratic mill against the will of Congress." Id. Boyanivskyy v. Gonzales, 450 F.3d 286, 292 (7th Cir. 2006) (citing Benslimane, and Subhan, where the judge refused a continuance for the alien's witnesses, then denied asylum for failure of proof, the court held that jurisdiction is retained despite § 1252(a)(2)(B)'s restrictions) where the action nullified a statutory

right or led to a denial on the merits of an immigration claim,

II.

This court has jurisdiction to review the denial of a motion to reopen exclusion proceedings that prevented Petitioner from establishing a defense to the exclusion charges which, if considered, would have resulted in the termination of the exclusion proceedings

Sections 1252(a)(2)(B)(i) and (ii) do not preclude this court from exercising its jurisdiction to review the Board's vacatur of its order reopening proceedings and, in so doing, ignoring evidence that Petitioner was not able to present in the original hearings that the immigration judge termed was crucial to the outcome. This issue raises questions of law, related to due process and jurisdiction is conferred under §242(a)(2)(D), §1252(a)(2)(D). Alsamhouri v. Gonzales, 84 F.3d 117, 123 (6th Cir. 2007). The document that Petitioner was unable to present in the original hearings was the advance parole document, which the government claimed did not exist and, according to the immigration judge, would have resulted in a termination of proceedings. Lacking that proof, Petitioner was ordered excluded and deported. Had such proof been presented, the exclusion proceedings would have been terminated.

Giving a reason that this court characterized as a non sequitur, the Board concluded that Petitioner was an "arriving alien" having been granted advance

parole. It did not discuss what effect the advance parole document would have had on the propriety of the exclusion proceedings initiated before the passage of IIRIRA. It also did not discuss whether fairness compelled it to delay proceedings or terminate them altogether to enable Petitioner to seek adjustment of status which he had so diligently pursued. The gist of Petitioner's motion to continue the proceedings or terminate them outright, was his pursuit of adjustment of status §245(i). The Board's decision placed a deliberate obstacle to that objective.

At a minimum, Petitioner could have established that he relied on the advance parole document as his ticket to admission in the United States following a brief trip abroad to resume his legalization application. Advance parole, while it did not admit an alien under IIRIRA, after a brief departure, it would not have led to an abandonment of his pending application for legalization benefits under IRCA. By concluding that Petitioner had the status of an "arriving alien," the Board inferred that he was ineligible for adjustment of status, presuming that status by reason of the Attorney General's former regulation, 8 C.F.R. §1245.2(c)(8). That regulation was subsequently rescinded. This court should reconsider whether the Board's opinion as to Petitioner's eligibility for adjustment of status was simply gratuitous in light of the Attorney General's decision to rescind that provision. See 71 Fed. Reg., No. 92, pp 27585-82 (May 12, 2006). Its refusal to grant Petitioner a continuance and its decision to vacate its order reopening the exclusion case was, in essence, a decision reinstating its exclusion order. Therefore the decisions rendered in this case were not, as this court in Ali postulated, an

interim step toward a nonreviewable decision. They were arbitrary and abusive in their design to deny Petitioner the opportunity of pursuing statutory relief.

This court has jurisdiction to review all actions taken that result in the entry or an exclusion order or a refusal to reconsider an exclusion order, issues formerly reviewable in habeas proceedings filed in the district court under pre-IIRIRA law. Having eliminated the remedy of habeas, Congress enacted § 106(b) of the REAL ID Act, Pub Law 119-13, 113 Stat. 231 (May 11, 2005), that amended §242(a)(2)(B), 8 U.S.C. §1252(a)(2)(B), grants this court the power to review:

> (B) Effective date. The amendments made by subsection (a) shall take effect upon the date of the enactment of this division and shall apply to cases in which the final administrative order of removal, deportation or exclusion was issued before, on or after the date of the enactment of this division.

The bottom line in this case is, ultimately, whether this court can consider whether the benefits of §245(i) are retroactive and available to aliens in exclusion proceedings and whether an immigration judge's refusal to continue those proceedings even where he has not jurisdiction to grant that relief amounts to an abuse of discretion and an unwarranted interference with alien's attempt to obtain relief in another forum. In order for aliens ordered excluded to qualify for those benefits, their only recourse is to seek adjudication from the USCIS. If the immigration judge unreasonably interferes, an alien loses the physical

presence requirement for such benefits. Whether Petitioner was admissible by reason of the grant of advance parole and therefore eligible for adjustment of status is a purely legal question, bearing not only on the propriety of the exclusion proceedings, but also on the denial of benefits to one class of aliens, those in exclusion proceedings, while conferring them to others, those who are in removal proceedings. Such issues are not beyond this court's jurisdiction. Petitioner's request for a continuance did not occur in the context of relief that the judge could adjudicate. It was not a judgment regarding the granting of relief under one of the statutory benefits enumerated §1252(a)(2)(B)(i). Fernandez v. Gonzales, 439 F.3d 592 (9th Cir. 2006).

CONCLUSION

For reasons stated above, Petitioner respectfully requests that his petition for rehearing be granted and this panel's opinion be reconsidered *en banc*.

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APPENDIX H

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 06-2441

[Filed February 11, 2008]

MADHUMILIND POTDAR, Petitioner,	)
v.	)
MICHAEL B. MUKASEY, United States Attorney General, Respondent.	)

RESPONDENT'S ANSWER TO PETITIONER'S PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

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INTRODUCTION

In a published decision dated October 10, 2007, this Court dismissed the instant petition for review pursuant to its decision in Ali v. Gonzales, 502 F.3d 659 (7th Cir. 2007), observing that it lacked jurisdiction to review the denial of a continuance request. Petitioner has petitioned for panel rehearing

with a suggestion for rehearing en banc, and the Court has directed a response.

Respondent Michael B. Mukasey respectfully submits that panel rehearing is warranted on the ruling that Potdar's motion to terminate his proceedings amounted to a continuance request before the agency because the panel misapprehended the nature of Potdar's termination motion. Should the Court uphold its finding that Potdar presented a continuance request to the agency, Respondent respectfully submits that rehearing en banc is warranted on the issue of the Court's jurisdiction to review continuance denials. The panel's decision directly conflicts with decisions from seven circuits that have considered the question. As explained below, this Court should grant en banc rehearing and adopt the majority rule.

Finally, the Court should deny Petitioner's request for rehearing or rehearing en banc on the issue of the Court's jurisdiction to review issues connected to the Board's initial order of May 22, 2003, finding him excludable where Petitioner failed to pursue a petition for review of that decision. On this issue, the panel's unanimous, published decision is correct as a matter of law, does not overlook or misapprehend any points of law or fact, and does not conflict with any decision of the Supreme Court, this Court, or any other court of appeals. Fed. R. App. P. 35(a), 40(a)(2).

BACKGROUND

Madhumilind Potdar ("Potdar") is a native and citizen of India who fist entered the United States

without inspection in 1981. Certified Administrative Record ("A.R.") 198. In 1994, he applied for legalization, seeking class membership under INS v. League of United Latin American Citizens, No. 87-4757, 1989 WL 252578 (C.D. Cal. Aug. 12, 1989), aff'd sub nom CSS v. Thornburgh, 956 F.2d 914 (9th Cir. 1992) ("LULAC"). A.R. 189-96. While his application was pending, he applied for and received a grant of advance parole, valid until August 15, 1996. A.R. 25. He traveled to India and returned to the United States on August 11, 1996 and was paroled into the United States through August 10, 1997. A.R. 25, 27.

On November 25, 1996, the former Immigration and Naturalization Service ("INS") revoked Potdar's grant of advance parole and placed him in exclusion proceedings. A.R. 29. The former INS charged Potdar with inadmissibility to the United States on three separate grounds: as an applicant for admission without a valid, unexpired visa under both 8 U.S.C. §§ 1182(a)(7)(A)(i)(I) (no valid immigrant visa or entry document) and 1182(a)(7)(B)(i)(II) (no valid nonimmigrant visa or border crossing card), and as an applicant for admission who procured a visa or other documentation by fraud under 8 U.S.C. § 1182(a)(6)(C)(I). A.R. 294. Potdar, through counsel, moved for termination of his exclusion proceedings. A.R. 211, 218, 229. On February 3, 1999, an immigration judge ("IJ") denied Potdar's motion, found him excludable as charged, and ordered him excluded and deported from the United States. A.R 114-19.

On May 22, 2003, the Board sustained in part and dismissed in part Potar's appeal. A.R. 78-80. The

Board dismissed the fraud charge and the charge that Potdar entered without a valid nonimmigrant visa. A.R. 79-80. It upheld the IJ's finding that Potdar was inadmissible as an alien without a valid immigrant visa, pursuant to 8 U.S.C. § 1182(a)(7)(A)(i)(I). A.R. 79. The Board reasoned that Potdar could not terminate his exclusion proceedings based upon his pending legalization application or based upon the fact that he was previously granted advance parole. A.R 78-79. Finding that Potdar's advance parole had been revoked on November 25, 1996, the Board concluded that Potdar was inadmissible and therefore subject to exclusion and deportation from the United States. A.R. 79. Potdar petitioned this Court for review of the Board's decision and this Court ultimately granted his motion for voluntary dismissal on September 30, 2003. See Potdar v. Ashcroft, No. 03-3271.

On August 25, 2003, Potdar, appearing pro se, moved the Board to reopen his case to consider new evidence, specifically, a copy of his advance parole document and evidence that he had a pending adjustment of status application based on an I-140 employment-based visa petition. A.R. 61. The Department of Homeland Security ("DHS") did not file a response to Potdar's motion. The Board granted the unopposed motion on November 7, 2003, and remanded the record to the IJ for further proceedings. A.R. 56.

While his case was pending before the IJ, Potdar filed a motion to terminate his exclusion proceedings pending the adjudication of either his legalization or adjustment applications. A.R. 19-21. The IJ concluded that the Board's prior inadmissability finding was

final, and construed Potdar's motion to terminate as a request to adjudicate the adjustment application in proceedings. A.R. 5-6. The IJ found that he lacked jurisdiction to consider the adjustment application and certified the case to the Board on July 6, 2005. A.R. 5-6.

In a decision dated April 26, 2006, the Board vacated its prior reopening and remand order. A.R. 2-3. Upon review, the Board found that it erred in granting Potdar's motion to reopen proceedings. A.R. 2-3. The Board reasoned that because Potdar had been paroled into the United States in August of 1996, he had not been "admitted" to the United States and remained aa "arriving alien." As such, the Board concluded that neither the IJ nor the Board had jurisdiction to entertain the application for adjustment of status. A.R. 2-3. Potdar filed a timely petition for review of the Board's decision with this Court.

In a published decision, the panel construed the agency's decisions as the denial of a continuance request and dismissed the petition for lack of jurisdiction. Potdar v. Keisler, 505 F.3d 680, 685 (7th Cir. 2007). The panel agreed with the government that its jurisdiction was limited to the Board's April 2006 decision. 505 F.3d at 683. It concluded that in reopening the case, the Board "did not resurrect jurisdiction over the issues underlying the initial exclusion order." Id.

The panel found that the Board reopened Potdar's case to consider his new evidence regarding potential relief from exclusion. Id. It observed that the substance of Potdar's motion to reopen was his request

that DHS have an opportunity to adjudicate his pending applications for relief prior to his removal from the United States, 505 F.3d at 684. The panel noted that Potdar renewed his request in his motion to terminate proceedings before the IJ. Id. The panel concluded that both the IJ and the Board "misapprehended" Potdar's request, and erroneously construed it as a request to adjudicate the adjustment application in his remanded exclusion proceedings. Id. The panel reasoned that the IJ "should have considered whether, to allow administrative adjudication to proceed, it would have been appropriate to terminate or continue exclusion proceedings." Id. (emphasis in the original).

The panel determined that Potdar's request before the IJ "amounted to a request for a continuance." Id. It noted that the IJ responded to a request that was never made and that his approach to Potdar's case was "not responsive to the inquiry the Board had placed before him. . . ." Id. The panel concluded that it lacked jurisdiction to review the denial of a continuance request and dismissed the petition for lack of jurisdiction. Id. at 685 (citing Ali).

ARGUMENT

I. THE PANEL MISAPPREHENDED POTDAR'S MOTION TO TERMINATE AND SHOULD GRANT REHEARING TO RECONSIDER ITS RULING THAT POTDAR REQUESTED A CONTINUANCE BEFORE THE AGENCY.

Respondent respectfully believes that the panel misconstrued Potdar's motion to terminate his

exclusion proceedings as a request for a continuance and that panel rehearing is warranted on the issue. The record reflects that Potdar moved to terminate his exclusion proceedings to allow the Citizenship and Immigration Services ("CIS") to adjudicate his pending adjustment or legalization applications. A.R. 19-21. DHS opposed Potdar's request. A.R. 12-13. Nowhere did Potdar alternatively request that the IJ continue his proceedings based on his pending applications for relief. See A.R. 19-21. In briefing before this Court, neither party construed Potdar's motion to terminate as a continuance request.

In reviewing the procedural background of the instant case, the panel recognized that Potdar filed a motion to terminate his proceedings, found that the agency's decisions were non-responsive to Potdar's request, and determined that "Potdar's request to the IJ amounted to a request for a continuance." 505 F.3d at 684. Upon construing Potdar's motion as a continuance request, the Court found that it lacked jurisdiction to review a continuance denial, and dismissed the petition for review. Id. at 685.

Continuing a proceeding and terminating a proceeding are two different procedural concepts. An IJ has discretion to grant or deny a continuance request, and may grant a request over a party's objection. See 8 C.F.R. § 1003.29 (providing that "the I||J|| may grant a motion for continuance for good cause shown."); see also 8 C.F.R. § 1240.6 (providing that "[a]fter the commencement of the hearing, the IJ may grant a reasonable adjournment either at his or her own instance or, for good cause shown, upon application by the respondent or the Service."). By

contrast, an IJ does not have the ability to grant a motion to terminate proceedings over the government's objection. See Yao v. INS, 2 F.3d 317, 319 (9th Cir. 1993) (finding that "the IJ was not empowered to terminate or suspend proceedings once initiated."); see Matter of Singh, 21 I. & N. Dec. 427, 435 (BIA 1996) (finding that "[a]s long as the Service chooses to prosecute the applicant's proceedings to a conclusion, the I[]J[]s and this Board must order the applicant excluded and deported if the evidence supports such a finding."). Although neither the IJ nor the Board addressed Potdar's termination request during his reopened proceedings, the only result of addressing it would have been a denial as DHS was on record as opposing the motion. A.R. 12-13.

In construing Potdar's motion to terminate as a motion to continue, the panel has conflated two procedurally different requests. Conflating the two concepts in this published precedent introduces uncertainty and confusion into the immigration proceedings within this Circuit. It may produce unforeseen results in the immigration courts and impose undue and unnecessary burdens on the IJs if they are led to believe, as the panel's opinion suggests, that a denial of a motion for termination might be reversible if it is not also construed as a motion to continue, even where, as here, the alien fails to make a specific continuance request. The panel should rehear the case to reconsider this misapprehension of fact. Fed. R. App. Pro. 40(a).

II. IF THE PANEL UPHOLDS ITS RULING, IT SHOULD REHEAR THE ISSUE OF ITS JURISDICTION OVER CONTINUANCE DENIALS EN BANC BECAUSE THE COURT'S DISPOSITION RELIES UPON CASE LAW THAT CREATES AN INTER-CIRCUIT CONFLICT.

If the panel declines to revisit its finding that Potdar requested a continuance before the agency below, it should grant en banc rehearing over the issue of its jurisdiction to review continuance denials. In reaching its disposition in the instant case, the panel relied on the Court's decision in Ali to find that it lacked jurisdiction to review the denial of a continuance. 505 F.3d at 685. Petitioner, who does not challenge the panel's finding that his motion to terminate amounted to a continuance request, asserts that the Court retains jurisdiction to review his continuance denial because it falls under the exception set forth in Subhan v. Ashcroft, 383 F.3d at 591 (7th Cir. 2004). Rehearing Petition ("Reh'g Pet.") at 5-8. Rehearing en banc is warranted on the broader issue of the Court's jurisdiction because the Court's holding that it lacks jurisdiction to review the agency's denial of a continuance is inconsistent with the relevant statutory language, and is contrary to the overwhelming weight of precedent from other circuits.

A conflict exists among the circuits regarding the courts of appeals' jurisdiction to review the denial of a continuance. This Court joined the Eighth and Tenth Circuits in holding that 8 U.S.C. § 1252(a)(2)(B)(ii) precludes review of an IJ's discretionary decision to deny a request for a continuance in removal

proceedings. Ali v. Gonzales, 502 F.3d 659 (7th Cir. 2007); Yerkovich v. Ashcroft, 381 F.3d 990, 993 (10th Cir. 2004); Onyinkwa v. Ashcroft, 376 F.3d 797, 799 (8th Cir. 2004). Those courts have reasoned that an IJ's decision to grant or deny a request for a continuance is a "decision or action . . . the authority for which is specified under" the relevant subchapter of the INA (8 U.S.C. §§ 1151-1381), 8 U.S.C. § 1252(a)(2)(B)(ii), because it derives from regulations that the Attorney General promulgated to implement 8 U.S.C. §§ 1229a(a) and (b), the statutory provisions authorizing IJs to conduct removal proceedings, and that in turn specify that the power to grant continuances is within the discretion of IJs. Ali, 662-64; Yerkovich, 381 F.3d at 993; Onyinkwa, 376 F.3d at 799.

The majority of circuit courts have reached a contrary conclusion. The First, Second, Third, Fourth, Fifth, Ninth, and Eleventh Circuits have all concluded that a decision by an IJ to grant or deny a continuance is not a decision "the authority for which is specified" under the relevant subchapter of the INA "to be in the discretion of the Attorney General," 8 U.S.C. § 1252(a)(2)(B)(ii), because an IJ's discretionay authority to act on a motion for a continuance is specified in a regulation, not a statutory provision within the relevant subchapter itself. See Lendo v. Gonzales, 493 F.3d 439, 441 n.1 (4th Cir. 2007); Alsamhouri v. Gonzales, 484 F.3d 117, 122 (1st Cir. 2007); Zafar v. United States Att'y Gen., 461 F.3d 1357, 1360 (11th Cir. 2006); Khan v. Attorney Gen. of the U.S., 448 F.3d 226, 232-233 (3d Cir. 2006); Ahmed v. Gonzales, 447 F.3d 433, 436-437 (5th Cir. 2006); Sanusi v. Gonzales, 445 F.3d 193, 198-199 & n.8 (2d

Cir. 2006) (per curiam).[1] The Sixth Circuit has reached the same result through a different analysis, concluding that "Section 1252(a)(2)(B)(ii) only applies to the portions of subchapter II that left to the Attorney General's discretion, not the portions of subchapter II that leave discretion with IJs in matters where IJs are merit decision-makers that are subject to [the courts of appeals'] review." Abu-Khaliel v. Gonzales, 436 F.3d 627, 632, 634 (6th Cir. 2006).

The majority position represents the better reading of the statute. The relevant statutory text requires that the "authority" for the "decision or action" at issue -- here, the denial of a continuance -- be "specified under this subchapter [subchapter II of Chapter 12 of Title 8] to be in the discretion of the Attorney General." 8 U.S.C. § 1252(a)(2)(B)(ii). Nothing in the relevant statutory "subchapter," however, mentions continuances, or "specifie[s]" that they may be granted "in the discretion of the Attorney General." Rather, an IJ's authority to continue a case derives from regulations promulgated to implement statutory provisions that broadly authorize IJs to conduct removal hearings, but do not specifically authorize them to grant or deny continuances. See, e.g., 8 U.S.C. § 1229a(a)(1). Given the general presumption in favor

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[1] Although the Ninth Circuit has not issued a published decision addressing whether the INA bars judicial review of an IJ's discretionary denial of a continuance, it has agreed with the majority position in an unpublished, nonprecedential opinion. See Martinez v. Gonzales, 166 Fed. App'x 300, 300 (2006); see also Medina-Morales v. Ashcroft, 371 F.3d 520, 528 (9th Cir. 2004) (holding that § 1252(a)(2)(B)(ii) does not preclude federal-court review of an IJ's denial of a motion to reopen).

of judicial review, INS v. St. Cyr, 533 U.S. 289, 298 (2001), and the terms of § 1252(a)(2)(B)(ii), the government agrees with the majority of circuit courts that an IJ's discretionary decision to deny a continuance is not covered by the jurisdictional bar in 8 U.S.C. 1252(a)(2)(B)(ii).

Prior to December 2006, the government had taken the position that 8 U.S.C. § 1252(a)(2)(B)(ii) precludes federal-court review of an IJ's denial of a continuance. In December 2006, in response to a petition for rehearing in Alsamhouri v. Gonzales, 484 F.3d 117 (1st Cir. 2007), the government reconsidered its position and concluded that the view of the majority of courts is correct. See Gov't C.A. Br. 7-13, Alsamhouri, supra. In Alsamhouri, the First Circuit initially held that it "ha[d] no jurisdiction over whether the denial of a continuance was an abuse of discretion." 458 F.3d 15, 16 (1st Cir. 2006), withdrawn on petition for reh'g, 471 F.3d 209 (1st. Cir. 2006). In response to the government's change in position, the First Circuit reversed course, "adopt[ed] the majority rule," and held that it "ha[d] jurisdiction to review a denial of a continuance." 484 F.3d at 122. Other courts that have adopted the minority position may well reconsider their holdings in light of the govemnent's recent change in position. See Ikenokwalu-White v. Gonzales, 495 F.3d 919, 924 n.2 (8th Cir. 2007) (suggesting that "it may be appropriate for our court to revisit this issue en banc"). Accordingly, because the issue of the Court's jurisdiction involves a question of "exceptional importance," the Court should rehear the issue en banc. Fed. R. App. Pro. 35(a)(2).

If this Court decides to revisit this jurisdictional issue en banc, then, it should hold that it has jurisdiction to review an IJ's denial of a continuance. In this case, because neither the IJ nor the Board viewed Potdar's motion as a motion for a continuance or adjudicated it under the standards relevant to such motions, Potdar, 505 at 684, this Court should remand the issue to the agency to consider in the first instance.[2] INS v. Ventura, 537 U.S. 12, 16, 123 S.Ct 353 (2002) (holding that "a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands.").

III. THE COURT SHOULD DECLINE TO REHEAR THE ISSUE OF ITS SCOPE OF REVIEW BECAUSE THIE PANEL DID NOT MISAPPREHEND ANY POINT OF FACT OR LAW, NOR IS THERE ANY INTRA-CIRCUIT OR SUPREME COURT CONFLICT.

Potdar raises a second issue in his petition which does not warrant panel or en banc rehearing. He appears to argue that the Court retains jurisdiction to review his claim that the Board ignored evidence regarding his excludability in its vacatur order, and asserts that the issue raises "questions of law, related

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[2] It may well be that Potdar's continuance request is now moot. He filed a I-140 on April 17, 2003, A.R. 69-70, it was denied on May 26, 2004, and his administrative appeal was dismissed on February 5, 2008. Potdar does not appear to have any other requests for relief pending. However, the agency should consider these developments in Potdar's case in the first instance. Ventura, 537 U.S. at 16.

to due process . . . ." Reh'g Pet. at 8. Potdar is mistaken and the Court should deny his petition with respect to this issue.

The panel correctly found that it lacked jurisdiction to consider issues underlying the Board's initial exclusion order, including the issue of Potdar's excludability, where Potdar failed to pursue a petition for review of that decision. 505 P.3d at 683 (citing Gao v. Gonzales, 464 F.3d 728, 729-30 (finding that "an alien who chooses to wait and files a petition only after reconsideration has been denied presents for judicial review only the order denying reconsideration.")). The merits of the Board's prior order finding Potdar excludable are not before this Court because Potdar failed to pursue a petition for review of that decision. See Stone v. INS, 514 U.S. 386, 401, 405-406 (1995); Sankarapillai v. Ashcroft, 330 F.3d 1004, 1005-06 (7th Cir. 2003) (time limit for filing petition for review is jurisdictional).

As the panel observed, "the Board reopened to consider new evidence that, despite Mr. Potdar's excludability, he may have been entitled to relief from exclusion." 505 F.3d at 683. In subsequently vacating its November 7, 2003 order reopening Potdar's proceedings, the Board ultimately denied Potdar's motion to reopen his proceedings because it could not grant the application for adjustment relief. See Fedorca v. Perryman, 197 F.3d 236, 238 (7th Cir 1999) (finding that the petitioner's original deportation order remained valid where an IJ reopened proceedings but subsequently vacated his reopening order). Thus, the panel correctly concluded that its review was limited "only to [the Board's final order vacating the earlier

order to reopen] and to the issues decided in the course of the reopened proceedings." 505 F.3d at 683.

Moreover, the panel's decision on this issue does not conflict with any Seventh Circuit, court of appeals, or Supreme Court precedent such that en banc rehearing is warranted. Indeed, Potdar does not make such a claim; rather, it appears that Potdar is merely attempting to relitigate the issue of whether he was properly placed in exclusion proceedings. Reh'g Pet. at 8-11. Under Potdar's interpretation, every Board decision denying a motion to reopen or reconsider would necessarily provide an alien with a fresh slate from which to seek judicial review of the Board's underlying decision. Such an interpretation is contrary to the statutory scheme, which "envision[s] two separate petitions filed to review two separate final orders." Stone, 514 U.S. at 405; see also Youkhana v. Gonzales, 460 F.3d 927, 934 (7th Cir. 2006) (citing 8 U.S.C. § 1252(b)(6)). Because the finality of the Board's initial decision was "not affected by the subsequent filing of [Potdar's] motion to re[open]," his failure to file, a separate petition for review of the Board's May 22, 2003 decision precludes this Court from reviewing that decision in its entirety. Stone, 514 U.S. at 405.

CONCLUSION

For the foregoing reasons, the petition for rehearing and rehearing en banc should be granted in part and denied in part.

Respectfully submitted,

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Dated February 11, 2008

APPENDIX I

[Filed March 25, 2008]

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March 20, 2008

Clerk of the Seventh Circuit
Court of Appeals
219 South Dearborn, 27th Floor
Chicago, IL 60604

Re: Petition for Rehearing
Potdar v. Mukasey, Case No 06-2441

Dear Clerk:

Pursuant to Rule 28(j) of the Federal Rules of Appellate Procedure, I herewith cite to the court a decision of the Second Circuit Court of Appeals,

decided on March 14, 2008, consolidating the appeals of: Sheng Gao Ni v. Board of Immigration Appeals, Case No. 06-477, Peng-Di Zhou v. Bureau of Citizenship and Immigration Services, Case No. 06-5239; and Pin Zhou Wang vs. Mukaskey, Case No. 06-5302. Ten copies of the court's decision are enclosed.

In each of these cases, the Petitioners contended that the Board erred in denying their motions to reopen proceedings so that they would not remain subject to final removal orders while they were pursing their applications for adjustment of status before the U.S. Citizenship and Immigration Services. The Second Circuit held that the Board erred and cited this court's decision in Potdar v. Keisler, 505 F.3d 680 (7th Cir. 2007), but distinguished the result reached by the Seventh Circuit on the holding that, in the Second Circuit, the rule is that jurisdiction exists to review denial of continuances.

Yours truly,

/s/
MARY L. SFASCIOTTI
Enclosures

cc: Attorney Melissa Neiman-Kelting,
Office of Immigration Litigation
U.S. Department of Justice

APPENDIX J

United States Court of Appeals
Seventh Circuit

No. 06-2441

[Filed October 10, 2007]

Madhumilind N. POTDAR,	)
Petitioner,	)
	)
v.	)
	)
Peter D. KEISLER, acting Attorney	)
General of the United States,	)
Respondent.	)
	)

Before RIPPLE, MANION and KANNE, Circuit Judges.

PER CURIAM.

Madhumilind Potdar, a native and citizen of India, was ordered excluded from the United States by an Immigration Judge ("IJ") on February 3, 1999. He appealed that order to the Board of Immigration Appeals ("BIA" or "Board"), which affirmed the IJ's order on narrower grounds. He subsequently filed a motion to reopen his exclusion proceedings with the Board and, on November 7, 2003, the Board granted

his motion and remanded the case to the IJ. On remand, the IJ concluded that he lacked jurisdiction and certified the case back to the Board. On April 26, 2006, the Board issued a new opinion, vacating its 2003 order. Mr. Potdar timely petitions for review of this decision. We conclude that we lack jurisdiction.

I

BACKGROUND

Mr. Potdar first entered the United States without authorization in 1981. In 1994, he applied for legalization benefits under the Immigration Reform and Control Act ("IRCA"), Pub.L. 99-603, 100 Stat. 3359 (1986). *See* A.R. at 198. While he awaited adjudication of his legalization application, Mr. Potdar needed to return to India to attend a family funeral. He sought and was granted advance parole, which allows an alien to leave the United States temporarily without being deemed to have abandoned any pending applications for immigration relief. After a month in India, Mr. Potdar returned to the United States and was paroled into the Country for a period of one year. Three months later, for reasons undisclosed by the record, the Service[1] revoked Mr. Potdar's parole and

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[1] At these early stages of Mr. Potdar's immigration history, his proceedings involved the Immigration and Naturalization Service ("INS"). On March 1, 2003, the relevant functions of the INS were transferred to the Department of Homeland Security ("DHS") and divided among the United States Citizenship and Immigration Service ("USCIS") and other departments within DHS. *See* Homeland Security Act of 2002, Pub.L. No. 107-296, 116 Stat. 2135. For ease of reading, we shall refer collectively to the

placed him in exclusion proceedings. The record does not contain any information about the status of his legalization application at that time.

Before the IJ, Mr. Potdar moved to terminate exclusion proceedings. He contended that, because he was a legalization applicant who had obtained advance parole prior to his departure and returned to the United States on the authority of that advance parole document, he was not an "arriving alien" upon his return. A.R. at 229-30 (citing *Rosenberg v. Fleuti,* 374 U.S. 449, 83 S.Ct. 1804, 10 L.Ed.2d 1000 (1963), and *Espinoza-Gutierrez v. Smith,* 94 F.3d 1270 (9th Cir. 1996)). Mr. Potdar attempted to locate evidence of his advance parole grant from the Service through a series of Freedom of Information Act requests; when those requests proved unsuccessful, he substantiated his claim that he did obtain advance parole with his own affidavit. Counsel for the Department of Homeland Security ("DHS") objected on the ground that it was Mr. Potdar's burden to produce the advance parole document and to demonstrate an entitlement to termination of proceedings. The IJ agreed with DHS and determined that Mr. Potdar had failed to meet his burden of proving that he had obtained advance parole. Based on this determination, the IJ then concluded that Mr. Potdar's motion to terminate exclusion proceedings could not be granted. The IJ further concluded that Mr. Potdar was excludable on three separate grounds: that he had committed visa fraud, *see* 8 U.S.C. § 1182(a)(6)(C)(i), that he was an

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benefits-granting divisions of these agencies as the "Service" and the prosecutorial divisions as the DHS.

arriving alien not in possession of a valid immigrant visa, *see id.* § 1182(a)(7)(A)(i)(I), and that he was an arriving alien not in possession of a valid nonimmigrant visa, *see id.* § 1182(a)(7)(B)(i)(II). Accordingly, the IJ ordered that Mr. Potdar be excluded from the United States. A.R. at 113.

The BIA affirmed this decision in April 2003, although on different grounds. The Board first concluded that, outside the Ninth Circuit, the doctrine announced in *Rosenberg v. Fleuti,* 374 U.S. 449, 83 S.Ct. 1804, 10 L.Ed.2d 1000 (1963), had no application to returning legalization applicants like Mr. Potdar, and therefore he had attempted to "enter" the United States when he returned from his brief trip to India. However, unlike the IJ, the Board acknowledged that Mr. Potdar indeed had been paroled into the United States, but further noted that his parole had been revoked. Accordingly, Mr. Potdar was returned to the status he had held before he was paroled, i.e., an alien seeking to enter the United States. On this basis-rather than the failure of Mr. Potdar to produce evidence of advance parole-the Board held that Mr. Potdar properly was subject to exclusion proceedings. Addressing the grounds for exclusion, the Board disagreed with the IJ that the charges of fraud had been sustained or that the failure of Mr. Potdar to produce a non-immigrant visa was an adequate ground of excludability. Because he was seeking legalization, the Board concluded, Mr. Potdar had immigrant intent, and, therefore, the final ground of failure to present an immigrant visa was the appropriate basis for exclusion.

Mr. Potdar did not file a timely petition for review of the Board's final order of exclusion. Instead, he continued to pursue other avenues of immigration relief. His employer sponsored him for an employment-based visa and submitted a labor certification application on his behalf in April 2001. After this application was approved, the employer petitioned for an immigrant visa on his behalf, and Mr. Potdar applied for adjustment of status.

On the basis of these pending applications, in August 2003, Mr. Potdar moved to reopen proceedings before the BIA. *See* A.R. at 61. He requested that proceedings be reopened so that the Service could consider his pending applications for an immigrant worker visa and adjustment of status. DHS did not respond to the motion. The Board ruled in Mr. Potdar's favor on November 7, 2003; it granted his motion to reopen and remanded the case to the IJ. *See* A.R. at 56.

When the case was before the IJ on remand, Mr. Potdar again moved to terminate exclusion proceedings. The IJ construed the remand order from the Board and Mr. Potdar's subsequent motion as a request for adjustment of status *by the immigration court*. The IJ concluded that he lacked jurisdiction to entertain an application for adjustment of status for an alien in Mr. Potdar's circumstances and certified, sua sponte, the record to the Board.

Upon consideration of the certified record, the Board held that it had "erroneously granted" Mr. Potdar's motion because it lacked authority to grant an application for adjustment of status to Mr. Potdar.

A.R. at 2. It therefore vacated its decision granting the motion to reopen. Mr. Potdar timely petitioned for review of this order.

II

DISCUSSION

A.

Mr. Potdar challenges the Board's final order, vacating its prior grant of his motion to reopen.

The parties dispute the scope of our review. Specifically, Mr. Potdar contends that, by virtue of the Board's decision to reopen the case in 2003, we may now reach all issues relating to the Board's initial affirmance of his exclusion order from which he had failed to petition for review in a timely manner. The acting Attorney General contends that our jurisdiction is limited to the most recent order denying the motion to reopen.

[1] We conclude that the Board's order reopening the case did not resurrect jurisdiction over the issues underlying the initial exclusion order. When the Board reopened the case, under this circuit's precedent, it vacated its order affirming exclusion and, therefore, rendered Mr. Potdar's proceedings non-final. *See Gao v. Gonzales*, 464 F.3d 728, 729-30 (7th Cir. 2006). It did not, however, reopen for reconsideration every issue decided in Mr. Potdar's initial proceedings. Instead, the Board reopened to consider new evidence that, despite Mr. Potdar's excludability, he may have been entitled to relief from exclusion. The final order

vacating the earlier order to reopen is the final order from which a timely petition for review was taken and, therefore, is the only order over which our jurisdiction extends. *See* 8 U.S.C. §§ 1252(a)(1), (b)(1), (b)(6). We examine Mr. Potdar's challenges only to that order and to the issues decided in the course of the reopened proceedings.

B.

In Mr. Potdar's motion to reopen, the new evidence that he asked the Board to consider included an approved labor certification, a pending petition for an employment-based visa and a pending application for adjustment of status. Mr. Potdar claimed that his labor certification, which had been filed prior to April 30, 2001, entitled him to the protections of § 245(i) of the Immigration and Nationality Act, 8 U.S.C. § 1255(i). Mr. Potdar asked for a stay of removal through the course of his reopened proceedings in order to permit his "Petition for Alien Worker (form I-140) and Application to Adjust to Permanent Resident Status (form I[-]485) [to be] adjudicated by the [Service]." A.R. at 61. On the basis of this request, and without opposition from DHS, the Board reopened his case "for consideration of an application for adjustment of status." A.R. at 56.

[2] It is through the lens of the motion to reopen, and the Board's initial action on that motion, that the remainder of the reopened proceedings must be evaluated. The gravamen of Mr. Potdar's request to the Board was that the part of the immigration agency responsible for adjudication of his applications ought to be given an opportunity to act prior to his removal

from the United States. The Board apparently agreed. In his reopened proceedings before the IJ, Mr. Potdar couched the same request in a motion to terminate exclusion proceedings. Although he challenged the grounds of exclusion on their merits in his motion, as he likewise has attempted to do in this court, Mr. Potdar made clear that his request for termination of proceedings and the reinstatement of his parole served a particular purpose: to render his exclusion order non-final and allow "*adjudication* of his Legalization application or any other application for status *pending with the [Service] office.*" A.R. at 20 (emphasis added).

Despite the context in which the case was reopened, the IJ nevertheless construed Mr. Potdar's submission as a request that *the IJ* grant his application for adjustment of status *in exclusion proceedings*. The IJ concluded that he lacked jurisdiction over that matter because aliens subject to exclusion proceedings must seek adjustment from the District Director of the Service rather than before the immigration courts. *See* 8 C.F.R. § 1245.2(a)(1); *see also Alvarez-Garcia v. Ashcroft*, 378 F.3d 1094, 1096 (9th Cir.2004).

In our view, the IJ plainly misapprehended the Board's order reopening proceedings. Mr. Potdar did not request adjustment of status from the IJ; he requested only an opportunity to pursue that relief through appropriate administrative channels. Rather than construe the application as one for adjustment, the IJ should have considered whether, *to allow administrative adjudication to proceed*, it would have been appropriate to terminate or continue exclusion proceedings. Mr. Potdar's request to the IJ amounted

to a request for a continuance. The relevant point, for our purposes, is that the IJ answered a question he was never asked; the approach he took to the case was not responsive to the inquiry the Board had placed before him in granting Mr. Potdar's motion to reopen the proceedings.

When the case returned to the Board on the IJ's certification, the Board did not correct the error. The Board simply concurred with the IJ that the immigration courts lacked jurisdiction over an application, which, so far as the record reveals, never was filed with the immigration court. *See Mengistu v. Ashcroft,* 355 F.3d 1044, 1047 (7th Cir.2004) (remanding when BIA's ground for denying a motion to reopen was "a non sequitur").

We must conclude that we have no jurisdiction to review the denial of the continuance in Mr. Potdar's case. *See Ali v. Gonzales,* 502 F.3d 659, Nos. 06-3240 & 06-3879, 2007 WL 2684825 (7th Cir. Sept. 14, 2007).

DISMISSED FOR LACK OF JURISDICTION

APPENDIX K

AFFIDAVIT OF AHMAD AL-MARBU

COMES NOW Ahmad Al-Marbu, who states upon his oath that the following is true and correct to the best of his knowledge:

1. That my name is Ahmad Al-Marbu. I live at **[redacted]**, Kansas City, Missouri. My telephone number is **[redacted]**. I am of legal age to make this sworn statement.

2. That I met Ayan Mohamed in September, 2002, and we were married on November 7, 2002 in Kansas City, Missouri.

3. That Ayan is a United States Citizen.

4. That we have a son Ali Hanat Al-Marbu, who will be one year old on June 6, 2004.

5. That I have a step-son named Mahamed Mohamed through my wife Ayan who is the natural mother of this five year old child.

6. That my step son Mahamed and I are very close, and I love him as if he was my own son.

7. That I stay at home and care for both our children while my wife works.

8. That I feed, bathe and care for Ali and Mahamed while Ayan is at work. I also take care of my step son Mohamed.

9. That I attend all appointments with my children at Pediatrician Dr. Ken Rogers' office.

10. That the children and I are extremely close with me and it would be terrible if we were forcibly separated, and could not live together.

11. That Ayan and I have a very happy and loving marriage, and I cannot even imagine not having her in my life, to live with and love each day.

12. That I entered the United States as a non-immigrant visitor with authorization to remain here through June 7, 2001.

13. That in April, 2002 a Master Hearing was held via video conference. That hearing was continued until November 19, 2002.

14. That Ayan had been a Lawful Permanent Resident for over five years at the time we got married on November 7, 2002, and later had a pending Naturalization Application with the INS.

15. That Ayan filed an I-130 Immigrant Visa Petition for me on November 12, 2002.

16. That on November 19, 2002, despite our request for a continuance to allow time for my I-130

petition to be adjudicated, a Master Hearing was held via video conference.

17. That during said November 19, 2002 hearing, the Immigration Judge somehow concluded he had made a finding at an April 2, 2002 Master Hearing that I was to be removed and made a determination that I was an overstay and gave me a date in March, 2003 to depart the United States.

18. I say above "somehow," because during both hearings, I was not permitted reasonable time by the Trial Judge to explain that I was in status, except in several limited ways that apparently were in some of the many "indiscernible" references in the transcript.

19. That I explained this problem of my being denied by the Judge to present evidence in paragraph 9 of my previous affidavit filed with this Court on May 9, 2004.

20. That a review of the transcript of both hearings indicate that these hearings' transcripts were incomplete, because the court reporter marked several parts of them as "indiscernible."

21. Specific "indiscernible" references in the transcripts of both hearings indicate the many efforts by my attorney and myself to show that I was in proper status at all times while I was in America, and therefore not an overstay as charged.

22. That the many "indiscernible" in the transcripts clearly indicate that I was not given a proper and fair trial. Many of the important issues that I was trying to explain were apparently never even heard by the Judge, due to obvious mechanical problems with the video equipment.

23. At the bottom of page 4 of the April 2, 2002 hearing transcript, please note the following excerpt:

> Q: All right, allegation five, you remained in the United States beyond June 7, 2001 without authorization from the Immigration and Naturalization Service, does he wish to admit or deny that?
>
> A: Deny that, (*indiscernible*) [emphasis added] he had a pending application for change of status to student visa plus he subsequently married Miss Brenda Al-Marbu who is with him today.

24. Further, in the middle of page five of the same transcript please note the following exchange.

> Q. So all right. At any rate, allegation eight, on October 2, 2001, Brenda Al-Marbu (Hagen) withdrew her petition that was filed on the respondent's behalf. Does he wish to admit or deny that?
>
> A. He denies that and she denies that.
>
> Q. All right

A. She was, she has subsequently amended any so called withdrawal. She was under a lot of stress at the time and she denies that she knowingly withdrew her petition. So we deny number eight.

Further at the bottom of page five and continuing onto page six same transcript please note the following.

Q. Fine. As to the charge, under Section 2379(a)(1)(B) of the Immigration and Naturalization Act as amended, A79 564 194 in that after admission as a non-immigrant under Section 101(a)(15) of the Act, you have remained in the United States for a long time than permitted. Does he wish to admit or deny that?

A. Deny that. Again you have a pending change of status application to a student visa.

24. The above statements at the above hearings meant to demonstrate I always denied in all court papers and orally to the judge that I was never an overstay, because particularly as I attempted to say to the judge, as part of the indiscernible at the bottom of page four, I was and always properly applied, or attempted to apply, for change of status to that of a student visa. This was done at about same time married my first wife, USC who had filed immigration petition for me at that time.

25. Because the transcripts of both April 2, 2002 and November 19, 2002 hearings are very incomplete because of the many references to indiscernible portions of the testimony and evidence that was being presented at that time. I particularly want to give you my view on the question on whether or not the court found me to be an overstay in the Unites States which was the only charge against me before that court.

26. As stated above, I always denied to the court overstay because I was properly in US as a routine tourist, and was married to an American wife who had routinely filed an immigrant visa petition on my behalf at that time I was planning to attend school.

27. Both my attorney and myself for several minutes, I recall, were trying to show the judge from my first wife's affidavit the last page of the amended I-130/485 filing for me, that she had withdrawn the entire complaint against me and asking the Amended petition reinstated the original petition dating back to when it was filed June 26, 2001.

28. My first wife Brenda's letter affidavit attached to this affidavit as attachment AA, as far as I know, is part of the INS record in this case but was never considered by the judge because he kept cutting off my attorney and myself when we attempted to present it and discuss it.

29. I strongly believe the above "indiscernible" references greatly prejudice my entire case now before the Appeals Court, because I am prevented from showing the court evidence we attempted to put in the record that I believe would fully explain that I was in status at all times and therefore not an overstay.

30. It's my understanding and I know my lawyer tried hard to explain to the judges at both my hearings, that's because my first wife Brenda and I filed aan I-130/485 joint petition on June 26, 2001, that that act made me an intending immigrant and thus gave me proper status to remain here and among other things, go to school pending a decision on the jointly filed petition.

31. As stated above, when my wife and I prepared and filed these papers, without attorney, on June 26, 2001, at the Kansas City INS, the counter person, after considerable discussion, told me it was unnecessary to file for change of non-immigrant status from tourist to student because the filing my wife and I had just done gave me intending immigrant status which was, of course, a higher legal status than non-immigrant student visa status and thus simply being unnecessary and almost silly to then apply for student visa.

32. The many references in both hearings transcripts to *(indiscernible)* words and evidence I attempted to presented, very much

prejudiced my entire case that I and my attorney were trying to present to the judge.

33. That because of many "indiscernible areas" in transcript, it is impossible for me to point out the errors and mistakes of the court, among other things, the cutting me off in an effort to get the court to look at all the evidence from both my June 26, 2001 petition filing and my conversation when filing it with the INS counter person, that made clear I always tried to be in proper status.

34. However, though I stated and explained in detail above how my wife and have been extremely prejudiced by the defective transcripts of both my hearings, I was also later prejudiced by the decision of the BIA which, amazingly clearly indicates it considered nothing in the "indiscernible" record of my case, including my important references, to Due Process violations and other such issues to the BIA court.

35. That I attempted to present evidence and testimony at my trial in support of my claim, that I was in proper status when I was arrested. The Judge cut me off in the middle of my testimony and only part of that evidence was presented and most of the cutting off of me speaking is listed as "indiscernible".

36. That I arrived in the United States with a valid tourist visa status.

36. I later decided I wanted to attend school here.

37. That I did not have an attorney and I did not know if I should apply for a student visa since I had a pending application for conditional residence through my former wife Brenda.

38. That I attempted to explain to the Judge at the hearing that I had went to the Immigration Service and the counter person there said I could apply for a change of status to that of a student, but it was not necessary since I had a pending application for conditional residence.

39. That there were many things about my being in status that I tried to explain to the Judge, but he was quite harsh and would not allow me to say everything I wanted to.

40. That because I had filed an I-485 Application For Permanent Residence, and was given a work permit, in effect, the law routinely gave me status equivalent to that of a student visa holder.

41. That is why I state that I have always been in proper status.

43. I understand the Government's lawyer stated that if I was removed from the United States, even if my visa petition that my wife Ayan filed for me is approved, I will not be able to return to the United States for ten years. Obviously, if I am not allowed to return to the United States for ten years, everyone knows my son, stepson,

wife and our entire family will be irreparably harmed.

44. That I am of good moral character. I have no criminal record in the United States nor in my native country, and I have been present at all court hearings and appointments with the Service.

* * *

APPENDIX L

Excerpts from Al-Marbu Affidavit
Reference to Vol. I, A.R. 000046-47

* * *

[p. 10]

That Petitioner supplied an Affidavit concerning the prejudicial effects of the "indiscernible" portions of the transcript on his case and evidence submitted to the Immigration Judge explaining why such "indiscernible" references made for an impossible appeal. [Vol. I, A.R. 000046] That in said Affidavit, among other things, Petitioner specifically cited the prejudical omissions due to the transcripts' 11 "indiscernible" references, as being:

[p.11]

A. That as a result of said hearing, the Immigration Judge made a determination that I was an overstay, and gave me a date in March, 2003 to depart the Untied States.

B. That during the November 19, 2002 hearing, I was not permitted any time by the Trial Judge to Explaint that I was in status.

C. That a review of the transcript of the removal hearing indicates that hte hearing was incomplete

because the court reporter marked several parts of it as "indiscernible."

D. That allthe "indiscernibles" on the transcript clearly indicate that I was not given a proper and fair trial. Many of the important issues that I was trying to explain were never even heard by the Judge, due to the obvious mechanical problems with the video equipment.

E. That the use of a "video" hearing to determine removablily violates my due process right to a fair hearing. [Vol. I, A.R. 000046-47]

* * *

APPENDIX M

"In Detention Excerpt"

* * *

[p. 15]

If one is granted an S Visa, then that person is eligible for adjustment of status and permanent residence. 8 C.F.R. §§ 245.11, 1245.11.

Petitioner's Motion to Reopen was denied by the BIA on May 24, 2005 [Vol. II, A.R. 000081-831, after refusing to allow Petitioner to fully brief the Court under a totally mistaken belief that Petitioner was "in detention", when he was not. [Vol. II, A.R. 000081-83]

This Decision of the Honorable BIA makes no indication that a review of the record was conducted, as part of consideration of this appeal, consistent with the requirement of *Matter of Ramos*, 23 I&N Dec. 336, 338 (BIA 2002) and the requirement of 8 C.F.R. §§ 3.2(b)(2), 3.23(b)(3). [Vol. I, A.R. 000052] That on July 1, 2005, Petitioner filed with the BIA [Vol. II, A.R. 000015-26], his Amended Motion to Reopen and Remand, and for a sixty day Stay of its May 24, 2005, Order, describing a serious BIA error pertaining to Petitioner's being so-called "detained." He was actually free on bond continuously from October 2, 2001, to the present, per attached USCIS Bond Documentation. [Vol. II, A.R. 000016-17]

Importantly, this "in detention" error led the BIA to not consider Petitioner's other arguments, concerning an "indiscernible" transcript. extension of voluntary departure, etc. [Vol. II, A.R. 000001] If there was a validly filed visa petition, that was approved or unadjudicated, the naturalization of the spouse [Per Petitioner's spouse herein] under U.S. law required the automatic upmading from a second preference visa petition to an immediate relative petition. According to Respondent's USCIS attorney Cozad, [Petitioner] has never proffered an approved I-130 petition in these proceedings. [Vol. I, A.R. 000005] [With all due respect, said requested, approved I-130 petition, Pet. Sep. App. #1 was proferred in said Motion to Reopen.

[p. 38]

This Court in reversing and remanding one of the two *Ssali infra*. cases presented, found the Respondent misread its own precedent in *Matter of Arthur*, *Ibid* and *Matter of Velarde*, *Ibid*, at pp. 564-566.

In connection with said denied Motion to Reopen, Petitioner was literally aghast because the Trial Judge appeared to promise Petitioner his case would be reopened. This court can understand Petitioner's chagrin, based on the following the statement fiom Judge Brahos:

> "You could take an appeal of the decision. During the appeal process if it's approved. the I-130, you can ask it to be remanded." [Vol. I, A.R. 000218]

Petitioner respectfully argues that it's clear from the Judge's statements above, that upon an I-130

petition approval, Petitioner's case should be routinely remanded by the BIA back to the Trial Judge for adjustment of status to Lawful Permanent Residence under a presumed-to-be- filed I-485 application.

Petitioner supplied the BLA a lawfully approved I-130 and an I-485 application for adjustment on April 4, 2005, as part of Petitioner's Motion to Reopen. The Board inexplicably denied that Motion on May 24, 2005. Petitioner is simply asking for that which the IJ said he could get, and thus is asking the Honorable Court to reverse the BIA's denial of Petitioner's timely filed Motion to Reopen and to remand it for adjustment of status action to the Trial Judge as that Judge stated he would do.

Further, this Court may want to consider reviewing closely the reasons given by the BIA in refusing to reopen Petitioner's case, as the BIA's refusal was essentially based on a totally mistaken finding that Petitioner was somehow "in detention." [Vol. II, A.R. 000081-83].

* * *

APPENDIX N

United States Court of Appeals
Seventh Circuit

No. 06-4039

[Filed June 27, 2007]

Juana R. LEGUIZAMO-MEDINA, Petitioner,	)
v.	)
Alberto R. GONZALES, Attorney General of the United States, Respondent.	)

Before EASTERBROOK, Chief Judge, and RIPPLE and EVANS, Circuit Judges.

EASTERBROOK, Chief Judge.

Juana Leguizamo-Medina, a citizen of Mexico, lacks permission to be in the United States. She applied for adjustment of status as the spouse of a citizen, Florencio Ybarra, and swore that she was living with him. At the hearing, however, she gave a different address-and the agency produced an affidavit from Ybarra that the "marriage" was a sham, for which he had been paid. Ybarra withdrew the

immediate-relative petition he had filed on behalf of Leguizamo-Medina, who nonetheless pressed on, this time with an application for cancellation of removal under 8 U.S.C. § 1229b. By the time a hearing was held on that application, Ybarra had recanted and submitted an affidavit stating that the marriage was real-although this second affidavit contradicted Leguizamo-Medina's own description of the marriage. (The affidavit, signed in February 1998, asserted that the couple had lived together since the marriage in January 1997; Leguizamo-Medina testified, however, that she moved out after four months and has not reconciled with Ybarra.) After finding that Leguizamo-Medina is living with and has had a child by a man other than Ybarra, the immigration judge concluded that the marriage was bogus. This meant that Leguizamo-Medina had given false testimony in order to obtain a benefit to which she is not entitled, a disqualifying event because "good moral character" is a statutory requirement for cancellation of removal. See 8 U.S.C. § 1229b(b)(1)(B). (The definition of "good moral character" is in 8 U.S.C. § 1101(f), and § 1101(f)(6) specifies that false testimony negates good moral character.) The Board of Immigration Appeals agreed.

[1] Leguizamo-Medina argues in this court that the IJ should have believed her story (and Ybarra's second affidavit) that the marriage was genuine. There is, however, a jurisdictional problem. Section 242(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1252(a)(2)(B)(i), provides:

> Notwithstanding any other provision of law ... and except as provided in subparagraph (D),

> and regardless of whether the judgment, decision, or action is made in removal proceedings, no court shall have jurisdiction to review-(i) any judgment regarding the granting of relief under section 1182(h), 1182(i), 1229b, 1229c, or 1255 of this title ... [.]

Leguizamo-Medina wants relief under § 1229b, so we must turn to the "except" clause, pointing to subsection (D), which reads:

> Nothing in subparagraph (B) or (C), or in any other provision of this chapter (other than this section) which limits or eliminates judicial review, shall be construed as precluding review of constitutional claims or questions of law raised upon a petition for review filed with an appropriate court of appeals in accordance with this section.

This tells us that "questions of law" may be reviewed. But Leguizamo-Medina's brief does not present any question of law. There is no dispute about the meaning of § 1101(f)(6), § 1229b(b)(1)(B), or any other legal rule.

Instead Leguizamo-Medina makes two factual arguments: first, that the IJ should have believed her testimony rather than Ybarra's and should not have drawn inferences from her living arrangements or the fact that Ybarra is not the father of at least one child born after the marriage; second, that the IJ abused his discretion by declining to grant a continuance so that Ybarra's sister could testify. Neither of these arguments comes within the scope of § 242(a)(2)(D), which reserves only pure questions of law. See, e.g.,

Cevilla v. Gonzales, 446 F.3d 658 (7th Cir. 2006). *Cevilla* observes that there is a conflict among the circuits on the question whether factual or discretionary decisions sometimes may be classified as questions of "law"; we held that they may not be, and that only "pure" legal questions (as opposed to characterizations or "mixed" questions) are covered by subsection (D). See also, e.g., *Skorusa v. Gonzales,* 482 F.3d 939 (7th Cir. 2007); *Mireles v. Gonzales,* 433 F.3d 965, 968 (7th Cir. 2006).

Leguizamo-Medina does not address either the statutory language or this court's decisions interpreting it. Her entire argument with respect to jurisdiction reads:

> Notwithstanding section 242(a)(2)(B)(i) of the [Act], this Court has jurisdiction to review the decision because it involves findings of fact and questions of law regarding good moral character, and not discretionary issues. *Morales-Morales v. Ashcroft,* 384 F.3d 418, 422 (7th Cir. 2004).

Morales-Morales dealt with the statute as it was in 2004, before the Real ID Act of 2005, 119 Stat. 231, 305 (May 11, 2005), substantially amended § 242 (8 U.S.C. § 1252). The panel in *Morales-Morales* expressed concern that, without some opportunity for judicial review of legal questions, the Attorney General could defy both the statute and the Constitution, and it treated pure questions of law as implied exceptions to the version of § 242(a)(2)(B) that preceded the Real ID Act. The 2005 amendments made subsection (a)(2)(B) more comprehensive than it was in 2004 but

added subsection (D), which directly addresses the concerns stated in *Morales-Morales*. We must apply the statute now in force, rather than the pre-2005 version, and the existing statute blocks review of arguments such as those that Leguizamo-Medina presents. (For what it is worth, *Morales-Morales* itself noted that the court would not review arguments that immigration judges erred in making findings of fact or managing hearings.)

For reasons that the brief does not disclose, the Attorney General concedes that the argument about the denial of a continuance is within our jurisdiction notwithstanding § 242(a)(2)(B)(i). The brief actually says that "Respondent declines to assert that the Court lacks jurisdiction over this issue", as if subject-matter jurisdiction were something that litigants may waive or forfeit when they think that it would be easier to decide the merits. That's not right. See *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). Subject-matter jurisdiction always comes ahead of the merits.

Perhaps the agency's lawyer has confused § 242(a)(2)(B)(i) with § 242(a)(2)(B)(ii), which says (again subject to the proviso in subsection (D)) that there is no judicial review of

> any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland

> Security, other than the granting of relief under section 1158(a) of this title.

The agency's lawyer refers to opinions such as *Ahmed v. Gonzales*, 465 F.3d 806 (7th Cir. 2006), and *Subhan v. Ashcroft*, 383 F.3d 591 (7th Cir. 2004), which hold that when the *relief* the alien wants is a continuance-for example, deferral of final decision until the Department of Labor decides whether to issue a certification that the alien has skills justifying a long-term stay in this country-an IJ's decision to enter a removal order without waiting is not the sort of discretion of which § 242(a)(2)(B)(ii) speaks.

What § 242(a)(2)(B)(ii) means is a difficult question that another panel has under advisement following the submission of supplemental briefs that were invited so that the court may clear up any confusion and inconsistency in our decisions. See *Ali v. Gonzales*, No. 06-3240 (argued Feb. 22, 2007). The agency's current understanding is that § 242(a)(2)(B)(ii) does not bar review of continuances because the discretion to grant or deny such motions is not a product of "this subchapter", a phrase that the agency now submits limits § 242(a)(2)(B)(ii) to *statutory* grants of discretion. That subject need not detain us, however, because it is § 242(a)(2)(B)(i) rather than § 242(a)(2)(B)(ii) that applies to Leguizamo-Medina's situation. The effect of § 242(a)(2)(B)(i) does not depend on whether discretion has been delegated by a particular statute (or whether any discretion at all has been exercised); it forecloses *all* review of decisions denying requests for cancellation of removal.

[2] When an alien seeks not deferral of final decision, but just an opportunity to present more evidence, it is difficult to see how one could "review the denial of a continuance" at all. The thing being reviewed (when review is authorized) is the agency's final decision (here, a decision not to cancel the petitioner's removal). In an appeal from a district court, we don't "affirm the order sustaining the hearsay objection" or anything similar; we review the final decision (see 28 U.S.C. § 1291) to determine whether the steps leading to that decision were erroneous (and, if erroneous, whether they were harmless). Just so here-with the difference that § 242(a)(2)(B)(i) puts the decision beyond review, and thus insulates the choices leading to that decision. When a decision is unreviewable, any opinion one way or the other on the propriety of the steps that led to that decision would be an advisory opinion. See, e.g., *Powerex Corp. v. Reliant Energy Services, Inc.*, ---U.S. ----, 127 S.Ct. 2411, 2419, 168 L.Ed.2d 112 (2007); *Daniels v. Liberty Mutual Insurance Co.*, 484 F.3d 884, 887-88 (7th Cir. 2007).

That would be clear enough if the agency's decision were unreviewable because Leguizamo-Medina had neglected to file a timely petition for review. She could not ask us to "review the denial of a continuance" anyway, even though our views about the continuance could not affect the agency's order. What is true about a decision that cannot be reviewed because the petition is untimely is equally true about a decision that cannot be reviewed because of a statute such as § 242(a)(2)(B)(i).

Subsection (D) could in principle allow review of a final order to determine whether procedural errors along the way to decision violated the alien's constitutional or statutory rights. After all, it preserves review of "questions of law," and one applicable law is 8 U.S.C. § 1229a(b)(4)(B), which entitles an alien to a "reasonable opportunity ... to present evidence" at the hearing. An immigration judge who thought that continuances are never appropriate, or who scheduled the hearing knowing that the date would make vital evidence unavailable, would deny the alien a reasonable opportunity to present evidence. Leguizamo-Medina does not contend, however, that the immigration judge managed the hearing in a way that deprived her of the required "reasonable opportunity." The date was set well in advance, and the immigration court regularly grants motions to reset the date for the convenience of counsel and witnesses. It requires, however, that such motions be presented 14 days in advance-a prudent step that allows the court to use all available time efficiently rather than be left with nothing to do if a hearing is cancelled at the last minute. Other aliens are waiting in a long queue for hearings, and adhering to schedules enables the IJ to use available time to maximum effect. When a hearing is postponed at the last minute, the slot cannot be filled with another alien's case.

Leguizamo-Medina does not contend that the 14-day-notice rule violates § 1229a(b)(4)(B). She simply ignores the rule, in this court as in the immigration court. Her motion was made on the day of the hearing, and she has never explained why it could not have been made earlier. Faced with this last-minute motion,

which may have been a stalling tactic, the IJ did the sensible thing and asked for an offer of proof. Counsel related what the missing witness would have said; the IJ then held that this evidence, if received in person and fully credited, would not affect the outcome. There's nothing remotely unreasonable about that procedure.

The petition for review is dismissed for want of jurisdiction.

APPENDIX O

UNITED STATES COURT OF APPEALS SEVENTH CIRCUIT

No. 03-3869

[Filed September 7, 2004]

MOHAMMED SUBHAN, Petitioner,	)
v.	)
JOHN D. ASHCROFT, Attorney General of the United States, Respondent.	)

Before POSNER, ROVNER, and DIANE P. WOOD, Circuit Judges.

POSNER, Circuit Judge.

This challenge to a removal (deportation) order requires us to mesh two immigration statutes. One of them, 8 U.S.C. § 1252(a)(2)(B), captioned "denials of discretionary relief," is a door-closing statute. It provides, so far as bears on this case, that "notwithstanding any other provision of law, no court shall have jurisdiction to review (i) any judgment regarding the granting of relief under section ... 1255

of this title, or (ii) any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General." The other statute, which happens to be referred to in section 1252(a)(2)(B)(i), quoted above, is 8 U.S.C. § 1255, which in its subsection (i) authorizes a removable alien to adjust his status to that of a permanent legal resident if he is certified to be entitled to be employed in the United States. This subsection, which is section 245(i) of the Immigration and Nationality Act and known as the LIFE Act, sunseted in 2001, but certain aliens, including Mohammed Subhan, a Pakistani who had become removable after his tourist visa expired, were grandfathered. 8 C.F.R. § 245.10(a)(1)(i)(B); *Lasprilla v. Ashcroft*, 365 F.3d 98, 100 (1st Cir.2004).

Subhan sought to adjust his status under the LIFE Act, and this required him to obtain certificates from both the Illinois and federal departments of labor. At an initial hearing in the removal proceedings, Subhan asked the immigration judge for, and the judge granted him, a six-month continuance to enable him to obtain the necessary certificates. He endeavored-with all due diligence, so far as appears-to obtain them; but the wheels of bureaucracy grind slow, and at the end of the six months he had not succeeded in obtaining them and so he sought and was granted a further six month continuance. Again through no laxity or other fault on his part, the labor departments did not act on his application within the further six-month period. But when, therefore, he applied for a third continuance, the immigration judge turned him down with no explanation beyond saying that while Subhan "may be able to eventually acquire lawful permanent

resident status by virtue of employment," not having done so as yet he was "not eligible for this form of relief at this time."

This was not a *reason* for denying the motion for a third continuance, but merely a statement of the obvious: that the labor departments hadn't yet acted. If the immigration judge had said that Subhan had dragged his feet or that it was obvious from the nature of his employment skills that he would not be granted the necessary certificates, or that he should have filed his application for adjustment of status before his tourist visa expired, or that he was a danger to the security of the United States, or that he was engaging in criminal activity or otherwise misbehaving, or even that an illegal alien should not be allowed to delay his removal beyond a year, the denial of the third continuance would have been reasoned, and we may assume would have been consistent with the adjustment-of-status statute. *Hassan v. INS*, 110 F.3d 490, 492-93 (7th Cir.1997); *Onyeme v. INS*, 146 F.3d 227, 233 (4th Cir.1998); *Castaneda-Suarez v. INS*, 993 F.2d 142, 146 (7th Cir.1993); *Al Khouri v. Ashcroft*, 362 F.3d 461, 464 (8th Cir.2004). But to deny the request for a continuance with no stated reason was, Subhan argues, inconsistent with that statute.

The government responds that the door-closing statute that we quoted at the outset of this opinion prevents us from addressing the merits of Subhan's complaint about the arbitrariness of the immigration judge's denial of a continuance. We quoted two subsections of the door-closing statute. The first precludes judicial review of "any judgment regarding the granting of relief under section ... 1255." We take

this to mean a judgment denying a request for adjustment of status, *Iddir v. INS*, 301 F.3d 492, 497 (7th Cir.2002); *Medina-Morales v. Ashcroft*, 371 F.3d 520, 528-29 (9th Cir.2004); *Prado v. Reno*, 198 F.3d 286, 290 (1st Cir.1999); cf. *Mireles-Valdez v. Ashcroft*, 349 F.3d 213, 215-17 (5th Cir.2003); *Mendez-Moranchel v. Ashcroft*, 338 F.3d 176, 177-78 (3d Cir.2003); *Montero-Martinez v. Ashcroft*, 277 F.3d 1137, 1140-44 (9th Cir.2002), and, so interpreted, the statute is inapplicable to Subhan's case. His request for adjustment of status has not been denied; and while the effect of the immigration judge's refusal to grant a continuance, and the order of removal that ensued, is the same as that of a denial, the purpose behind the door-closing provision is presumably to shield from judicial review judgments regarding the propriety of adjusting an alien's status, and no such judgment has ever been made with regard to Subhan. See *Prado v. Reno, supra*, 198 F.3d at 291-92; *Medina-Morales v. Ashcroft, supra*, 371 F.3d at 527. When a request for an adjustment of status is denied there is no judicial review because the denial is one of the discretionary orders expressly made nonreviewable by section 1252(a)(2)(B). But no discretion was exercised here to deny a requested adjustment of status; instead, the denial of the continuance prevented the alien from obtaining action on his request.

The second subsection of the door-closing statute, we recall, denies judicial review of "any other decision or action of the Attorney General the authority for which is specified under this subchapter to be in the discretion of the Attorney General." There are two ways to take this. One, suggested by our decision in

Pilch v. Ashcroft, 353 F.3d 585, 587 (7th Cir.2003), is that the reference is to final decisions: "The thing under review is the agency's final decision, not the language of its opinion; and if the decision is to withhold certain discretionary remedies, that's the end." 8 U.S.C. § 1252(a)(1) limits judicial review of immigration orders to final decisions, which in this case is the order removing Subhan. As that is not a discretionary decision, see 8 U.S.C. § 1229a(e)(2)(A); *Olowo v. Ashcroft,* 368 F.3d 692, 699 (7th Cir.2004); *Nakamoto v. Ashcroft,* 363 F.3d 874, 880-81 (9th Cir.2004), review is not precluded.

A second possibility, however, one not foreclosed by *Pilch,* which refers to "the language" of the agency's decision rather than to interim rulings, is that "any other decision or action" includes interim orders, and if the interim order in question is discretionary then we cannot review it. It is routine for appellate courts to review interim rulings by trial courts, including denials of continuances, in appeals from final decisions. *United States v. Pearson,* 340 F.3d 459, 467-68 (7th Cir.2003); *LeBlang Motors v. Subaru of America, Inc.,* 148 F.3d 680, 689 (7th Cir.1998). It is likewise routine for courts reviewing final decisions of deportation or removal to review denials of continuances in the proceedings leading up to that decision. *Castaneda-Suarez v. INS,* 993 F.2d 142, 146 (7th Cir.1993); *Oluyemi v. INS,* 902 F.2d 1032, 1033-34 (1st Cir.1990). And since orders denying motions for continuances, like other orders governing the management of trials, are traditionally and indeed inevitably discretionary in character. *Hassan v. INS, supra,* 110 F.3d at 492; *Ponce Leiva v. Ashcroft,* 331 F.3d 369, 377 (3d Cir.2003); *Onyeme v. INS, supra,* 146

F.3d at 231; *Baires v. INS*, 856 F.2d 89, 91 (9th Cir.1988), it is apparent that section 1252(a)(2)(B)(ii) withdraws from the courts the power to review such rulings when made by an immigration judge. *Yerkovich v. Ashcroft*, 381 F.3d 990, 2004 WL 1859928 (10th Cir. Aug.20, 2004); *Onyinkwa v. Ashcroft*, 376 F.3d 797, 2004 WL 1574514, at *2 (8th Cir. July 15, 2004); cf. *Avendano-Ramirez v. Ashcroft*, 365 F.3d 813, 819 (9th Cir.2004); *Castellano-Chacon v. INS*, 341 F.3d 533, 544 (6th Cir.2003). One "action" that the Attorney General is authorized to take in immigration matters is to conduct removal proceedings, § 1229a(a)(2), which implies acting on requests for continuances; and so we are not surprised that an implementing regulation provides that "an immigration judge may grant a continuance for good cause shown." 8 C.F.R. § 1002.39.

Supposing, therefore, though without having to decide, that section 1252(a)(2)(B)(ii)*generally* bars judicial review of a continuance granted by an immigration judge in a removal proceeding, we nevertheless think it unlikely that Congress, intending, as it clearly did, to entitle illegal aliens to seek an adjustment of status upon the receipt of certificates from the state and federal labor departments, at the same time also intended section 1252(a)(2)(B)(ii) to place beyond judicial review decisions by the immigration authorities that nullified the statute. If that section is applicable to cases such as this-cases, that is, in which rulings on requests for adjustment of status are precluded by procedural rulings-immigration judges can with impunity refuse to grant one-week continuances to persons in Subhan's position. And that would sound the death knell for the request, since unlike most grounds for adjustment of

status, adjustments based on employment, like those based on marriage to a U.S. citizen, cannot be pursued once the alien has been removed from the United States. 8 U.S.C. § 1255(i); *Padilla v. Ashcroft,* 334 F.3d 921, 925 (9th Cir.2003); *Valderrama v. INS,* 260 F.3d 1083, 1089 n. 7 (9th Cir.2001).

We conclude that the immigration judge, seconded by the Board of Immigration Appeals, which affirmed him without discussing his denial of the continuance, violated section 1255(i) when he denied Subhan a continuance without giving a reason consistent with the statute (indeed without giving any reason). So the order of removal cannot stand and there is no need for us to consider Subhan's alternative ground-that the denial of the third request for a continuance was arbitrary and therefore a denial of due process (the government concedes that the door-closing statute is inapplicable to orders that violate the Constitution, *Robledo-Gonzales v. Ashcroft,* 342 F.3d 667, 679 (7th Cir.2003); *Torres-Aguilar v. INS,* 246 F.3d 1267, 1271 (9th Cir.2001); *Mendes v. INS,* 197 F.3d 6, 11 (1st Cir.1999))-beyond noting our reluctance to emasculate the door-closing statute by equating arbitrary rulings to denials of due process. *Dave v. Ashcroft,* 363 F.3d 649, 652-53 (7th Cir.2004); *Gonzalez-Oropeza v. U.S. Attorney General,* 321 F.3d 1331, 1333 (11th Cir.2003).

The petition for review is granted and the case returned to the immigration authorities for further proceedings consistent with this opinion.

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No. 07-1613

FILED

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In the Supreme Court of the United States

AHMAD AL-MARBU, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a federal court of appeals lacks jurisdiction under 8 U.S.C. 1252(a)(2)(B)(ii) to review an immigration judge's denial of an alien's request to continue removal proceedings.

2. Whether petitioner was denied due process in his removal hearing due to an allegedly defective transcript.

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In the Supreme Court of the United States

No. 07-1613

AHMAD AL-MARBU, PETITIONER

v.

MICHAEL B. MUKASEY, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is not published in the *Federal Reporter* but is reprinted in 248 Fed. Appx. 748. The decisions of the Board of Immigration Appeals (Pet. App. 9a-13a) and the immigration judge (Pet. App. 17a-22a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 26, 2007. A petition for rehearing was denied on March 26, 2008 (Pet. App. 23a-24a). The petition for a writ of certiorari was filed on June 24, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 12541.

STATEMENT

1. a. In 1996, Congress amended the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, to ex-

pedite the removal of criminal and other illegal aliens from the United States. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, Div. C, 110 Stat. 3009-546. As relevant here, Congress amended the INA to limit judicial review of certain discretionary decisions of the Attorney General. As amended, the relevant section of the INA now provides that no court shall have jurisdiction to review any

> decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security, other than the granting of relief under section 1158(a) of this title.

8 U.S.C. 1252(a)(2)(B)(ii). The phrase "this subchapter" refers to Title 8 of the United States Code, Chapter 12, subchapter II, which is codified at 8 U.S.C. 1151 through 1381 and pertains broadly to immigration matters. *Van Dinh* v. *Reno*, 197 F.3d 427, 433 (10th Cir. 1999).

b. The INA authorizes immigration judges (IJs) to conduct removal proceedings. 8 U.S.C. 1229a(a)(1). The Attorney General has promulgated regulations that provide rules of procedure for removal proceedings, in order to "assist in the expeditious, fair, and proper resolution of matters coming before Immigration Judges." 8 C.F.R. 1003.12. Under those rules of procedure, if an alien seeks a continuance of proceedings, "[t]he Immigration Judge may grant a motion for continuance for good cause shown." 8 C.F.R. 1003.29; see 8 C.F.R. 1240.6 ("After the commencement of the hearing, the immigration judge may grant a reasonable adjournment either at his or her own instance or, for good cause

shown, upon application by the respondent or the Service.").

"The grant of a continuance is within the IJs' broad discretion." *Zafar* v. *United States Att'y Gen.*, 461 F.3d 1357, 1362 (11th Cir. 2006). To obtain reversal by the Board of Immigration Appeals (BIA) of the denial of a continuance by an IJ, an alien must show, *inter alia*, "that the denial caused him actual prejudice and harm and materially affected the outcome of his case." *In re Villarreal-Zuniga*, 23 I. & N. Dec. 886, 891 (B.I.A. 2006) (internal quotation marks omitted).

c. The INA provides that the Attorney General may, in his discretion, adjust the status of an alien inspected and admitted into the United States to that of a lawful permanent resident. See 8 U.S.C. 1255. One way to become eligible for adjustment of status is through marriage to a United States citizen or lawful permanent resident. In that instance, the alien's spouse must first file a petition for an immigrant visa (Form I-130). 8 U.S.C. 1154(a); 8 C.F.R. 204.2. Then the alien must apply for adjustment of status. As relevant here, an alien is only eligible for adjustment of status if he is "eligible to receive an immigrant visa" *and* "an immigrant visa is immediately available to him at the time his application [for adjustment of status] is filed." 8 U.S.C. 1255(a). Even if an alien is eligible for adjustment of status, a favorable exercise of discretion to adjust his status is "a matter of grace, not right," *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978), and the applicant "has the burden of showing that discretion should be exercised in his favor," *In re Patel*, 17 I. & N. Dec. 597, 601 (B.I.A. 1980).

d. The INA provides that the Attorney General "may permit" certain removable aliens "voluntarily to depart the United States at [their] own expense" in lieu

of being removed. 8 U.S.C. 1229c(a)(1) and (b)(1). Aliens who are granted voluntary departure and comply with its terms avoid the period of inadmissibility that would otherwise result from departure following entry of an order of removal under 8 U.S.C. 1182(a)(9)(A), although other grounds of inadmissibility may still apply. See 8 C.F.R. 1241.7 ("an alien who departed before the expiration of [a] voluntary departure period * * * shall not be considered to [have been] deported or removed"). Voluntary departure also permits aliens "to choose their own destination points, to put their affairs in order without fear of being taken into custody at any time, [and] to avoid the stigma * * * associated with forced removals." *Lopez-Chavez* v. *Ashcroft*, 383 F.3d 650, 651 (7th Cir. 2004).

The INA and the Attorney General's regulations contain a number of provisions designed to ensure that aliens who have been granted the privilege of voluntary departure actually depart in a timely fashion. The INA strictly limits the period for which a grant of voluntary departure may last. For aliens who are granted that privilege at the conclusion of removal proceedings: "Permission to depart voluntarily * * * shall not be valid for a period exceeding 60 days." 8 U.S.C. 1229c(b)(2); see 8 C.F.R. 1240.26(e). An alien permitted to depart voluntarily at the conclusion of removal proceedings "shall be required to post a voluntary departure bond, in an amount necessary to ensure that the alien will depart." 8 U.S.C. 1229c(b)(3); see 8 C.F.R. 1240.26(c)(3). An IJ who grants voluntary departure must "also enter an alternate order [of] removal." 8 C.F.R. 1240.26(d). If the alien does not depart within the time specified in the order granting voluntary departure, the alternate order of removal becomes final and

the alien becomes "ineligible, for a period of 10 years" to receive certain forms of discretionary relief, including adjustment of status. 8 U.S.C. 1229c(d)(1)(B); 8 C.F.R. 1240.26(a).

2. Petitioner, a native and citizen of Jordan, was admitted to the United States in 2000 as a non-immigrant visitor with authorization to remain in the United States for six months. Pet. App. 3a. Petitioner failed to depart the United States when required, *ibid.*, and he has remained in this country ever since.

In May 2001, petitioner married Brenda Freeman, a United States citizen. Pet. App. 3a. Shortly thereafter, Freeman filed an immediate relative petition for an immigrant visa (Form I-130) for petitioner. *Ibid.* In October 2001, however, Freeman sent a letter to the former Immigration and Nationalization Service (INS),[1] in which she stated that she wished to withdraw the petition. *Ibid.* Petitioner was placed in removal proceedings, and the INS charged him with being removable because he remained in the United States longer than permitted. *Id.* at 3a, 17a-18a; see 8 U.S.C. 1227(a)(1)(B). Freeman then filed an amended relative visa petition in November 2001. Pet. App. 4a.

In April 2002, petitioner first appeared before an IJ. He denied that he was removable, claiming that he had a pending application for a student (F-1) visa. Pet. App. 3a; AR1 201-203.[2] Petitioner acknowledged, however,

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[1] On March 1, 2003, the INS ceased to exist as an agency within the Department of Justice and its enforcement functions were transferred to the Department of Homeland Security (DHS), pursuant to Section 441 of the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

[2] "AR1" refers to the volume of the Certified Administrative Record filed with the Seventh Circuit in No. 04-2055, and "AR2" refers to the

that his application for a student visa had never been approved. Pet. App. 3a; AR1 203.[3] The IJ found petitioner removable as charged. Pet. App. 3a-4a; AR1 207. Petitioner also claimed that he was eligible for adjustment of status based on his marriage to Freeman. Pet. App. 4a. The IJ noted, however, that petitioner was only eligible for adjustment of status if Freeman's amended relative visa petition had been approved, which it had not. AR1 207. Petitioner then requested that the proceedings be continued for six months to permit adjudication of that petition, and the IJ granted the request and set petitioner's next hearing for November 2002. Pet. App. 4a; AR1 209.

In October 2002, petitioner and Freeman divorced. Pet. App. 4a. About a month later, just before his next immigration hearing, petitioner married Ayan Mohamed, a lawful permanent resident of the United States. *Ibid.*[4] Mohamed filed a new relative visa petition (Form 1-130) for petitioner. *Ibid.* One week before his upcoming hearing, petitioner filed a motion for a continuance, in order to gain additional time for the INS to

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volume of the Certified Administrative Record file in No. 05-2824. See Pet. App. 2a n.1.

[3] DHS has informed this Office that its records indicate that petitioner filed an application to extend or change his nonimmigrant status in May 2001, but those records do not reveal whether the application was for a student visa or a different form of relief. In any event, DHS records reflect that additional information was requested from petitioner regarding the application in September 2001, and when no response from petitioner was received, his application was considered abandoned. As a result, a notice denying the application was sent to petitioner in January 2002. Petitioner therefore had no student visa application pending at the time the IJ ordered him removed.

[4] Mohamed was naturalized in November 2003. Pet. App. 5a.

adjudicate his new petition. *Ibid.* The IJ did not rule on that motion prior to the scheduled hearing. *Id.* at 5a.

At his November 2002 hearing, petitioner reiterated his request for a second continuance to allow consideration of his new visa petition. Pet. App. 5a; AR1 217. He explained that he was divorced from Freeman but wished to seek adjustment of status based on his new marriage. AR1 217-218. In the alternative, petitioner requested voluntary departure. AR1 219-220. The INS opposed the continuance motion on the ground that petitioner did not meet his burden of proving that his twelve-day-old marriage was *bona fide*. AR1 216-218.

The IJ issued an oral decision denying petitioner's motion for a continuance and granting his request for voluntary departure. Pet. App. 17a-22a. First, the IJ reiterated his previous determination that petitioner was removable as charged. *Id.* at 19a. The IJ then denied petitioner's request for a continuance, explaining that petitioner "does not have an I-130 approval for immediate relative and therefore is not eligible for adjustment of status." AR1 193; see Pet. App. 19a-21a. The IJ further explained that the fact that petitioner had a pending visa petition based on his second marriage was not sufficient to warrant a continuance, particularly because the BIA has held that an alien who marries after being placed in removal proceedings has the heavy burden of establishing that his marriage is *bona fide*. *Id.* at 19a-20a (citing *In re Arthur*, 20 I. & N. Dec. 475 (B.I.A. 1992) (declining to grant a motion to reopen to consider an application for adjustment of status based on a mar-

riage that occurred after an alien had been placed in removal proceedings)).[5]

The IJ then granted petitioner voluntary departure, and, in the alternative, entered an order of removal. Pet. App. 20a-21a. The IJ noted that if petitioner failed to depart voluntarily, he would be removed. *Ibid.* The IJ expressly stated that if petitioner failed to depart voluntarily, he would be ineligible for adjustment of status for ten years. *Id.* at 21a-22a.

3. Petitioner appealed to the BIA, which had the effect of rendering the IJ's decision (including its grant of permission to depart voluntarily) nonfinal. Pet. App. 5a; see 8 U.S.C. 1101(a)(47)(B)(i) (providing that a removal order "become[s] final" upon affirmance by the BIA or expiration of the time for seeking BIA review); 8 U.S.C. 1229c(b)(1). The BIA affirmed the IJ's denial of a continuance without a separate opinion and dismissed petitioner's appeal. Pet. App. 12a-13a. It then entered an order upholding the IJ's grant of voluntary departure and requiring petitioner to depart within 30 days. *Ibid.*[6] The BIA specifically warned petitioner that

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[5] Petitioner made no attempt to satisfy that burden at his removal hearing; his attorney simply asserted that petitioner believed his new wife "might be pregnant." AR1 217.

[6] The IJ granted petitioner a period of 110 days within which to depart voluntarily. Pet. App. 20a-21a. That was error. In order to receive more than 60 days to depart voluntarily, an alien must request voluntary departure in lieu of or prior to the completion of his removal proceedings. 8 U.S.C. 1229c(a)(1) and (2). An IJ may grant such a request only if, *inter alia*, the alien "[m]akes no additional requests for relief," "[c]oncedes removability," and "[w]aives appeal of all issues." 8 C.F.R. 1240.26(b)(1)(i)(B), (C) and (D). Petitioner did not satisfy those conditions, and he was therefore limited to a maximum departure period of 60 days. See 8 U.S.C. 1229c(b)(2); 8 C.F.R. 1246.26(e). The

if he failed to depart within that time period, he would be subject to civil penalties and would "be ineligible for a period of 10 years for any further relief under" various sections of the INA, including 8 U.S.C. 1255, which addresses adjustment of status. Pet. App. 13a. Petitioner filed a petition for review of the BIA's decision in the court of appeals. *Id.* at 6a.

Petitioner also filed a reconsideration motion with the BIA, which was denied. Pet. App. 5a-6a. Petitioner did not seek a stay of his period of voluntary departure from the BIA. Instead, he sought a stay of his voluntary departure period from the DHS District Director, who denied that request. AR2 182-184.[7]

4. In April 2005, over two years after the BIA affirmed the IJ's decision, petitioner filed a motion to reopen with the BIA in order to pursue adjustment of status because Mohamed's I-130 petition had been approved. Pet. App. 6a; 8 C.F.R. 1245.2(a)(1)(i). The BIA denied the motion to reopen because it was untimely. Pet. App. 9a-10a; see 8 U.S.C. 1229a(a)(7)(C)(i) (providing that a motion to reopen "shall be filed within 90 days of the date of entry of a final administrative order of removal"). The BIA noted the 90-day deadline for motions to reopen and explained that there is "no basis for abrogating the motions deadline" in petitioner's case, both because "[a] DHS processing delay is not a basis for excusing the motion deadline" and because petitioner "is ineligible for the relief sought, adjustment of status,

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IJ's error was harmless, however, because the BIA reduced the voluntary departure period to 30 days. Pet. App. 13a.

[7] After his period of voluntary departure had expired, petitioner again asked the District Director to extend his period of voluntary departure. AR2 187-190. The record does not reflect whether the District Director acted on that motion.

based on his failure to depart under an order of voluntary departure." Pet. App. 10a-11a. Petitioner filed a petition for review of the BIA's decision in the court of appeals, which the court of appeals consolidated with his other pending petition. *Id.* at 6a.

Petitioner also again filed a motion for reconsideration of the BIA's decision, which was denied. Pet. App. 7a.

5. In an unpublished, nonprecedential opinion, the court of appeals denied the consolidated petition for review. Pet. App. 1a-8a. As relevant here, the court of appeals determined that it lacked jurisdiction under 8 U.S.C. 1252(a)(2)(B)(ii) to review petitioner's contention that the IJ abused his discretion in denying petitioner a continuance. Pet. App. 7a-8a. The court relied on its prior decision in *Ali* v. *Gonzales*, 502 F.3d 659, 663-664 (7th Cir. 2007), cert. denied, 128 S. Ct. 1870 (2008), where it had held that it lacked jurisdiction to review an IJ's denial of a continuance under 8 U.S.C. 1252(a)(2)(B)(ii) because, although "the INA is silent on the subject of continuances," "the immigration judge's *authority* to conduct and control the course of removal proceedings is 'specified in' subchapter II of the INA, and this necessarily encompasses the discretion to continue the proceedings." Pet. App. 8a. The court of appeals also rejected petitioner's remaining contentions, which included an argument that the existence of a few "indiscernible" notations in the transcript of his removal hearing violated his due process rights, stating that they were "without merit." *Ibid.*

ARGUMENT

1. Petitioner seeks review of the court of appeals' determination that 8 U.S.C. 1252(a)(2)(B)(ii) precluded it from reviewing the IJ's denial of his request to continue his removal proceedings. Pet. i. The courts of appeals have divided on that question, but review would be premature at this time. Moreover, this case is not a suitable vehicle for addressing the existing tensions in lower court authority. Because petitioner is removable, because he could not show that the IJ abused his discretion in denying a continuance, and because the BIA held that he is ineligible for adjustment of status in any event, petitioner cannot ultimately succeed on the merits of his challenge to the removal order. This Court has denied petitions for certiorari raising the same issue in similar postures in the past. See *Gulati* v. *Mukasey*, 128 S. Ct. 1877 (2008) (No. 07-1005); *Ali* v. *Mukasey*, 128 S. Ct. 1870 (2008) (No. 07-798). There is no justification for a different outcome here.

a. The federal courts of appeals are in conflict regarding whether they have jurisdiction under the INA to review an IJ's denial of a continuance. In the decision below, the Seventh Circuit held, consistent with its prior decision in *Ali* v. *Gonzales*, 502 F.3d 659 (2007), cert. denied, 128 S. Ct. 1870 (2008), that 8 U.S.C. 1252(a)(2)(B)(ii) precludes review of an IJ's discretionary decision to deny a request for a continuance in removal proceedings. See Pet. App. 8a. The Eighth and Tenth Circuits have agreed. See *Yerkovich* v. *Ashcroft*, 381 F.3d 990, 993 (10th Cir. 2004); *Onyinkwa* v. *Ashcroft*, 376 F.3d 797, 799 (8th Cir. 2004). Those courts have reasoned that an IJ's decision to grant or deny a request for a continuance is a "decision or action * * * the authority for which is specified under" the relevant

subchapter of the INA (8 U.S.C. 1151-1381), 8 U.S.C. 1252(a)(2)(B)(ii), because it derives from regulations that the Attorney General promulgated to implement 8 U.S.C. 1229a(a) and (b). Those are the statutory provisions authorizing IJs to conduct removal proceedings, and that in turn specify that the power to grant continuances is within the discretion of IJs. *Ali*, 502 F.3d at 663-664; *Yerkovich*, 381 F.3d at 993; *Onyinkwa*, 376 F.3d at 799.

The majority of circuit courts have reached a contrary conclusion. The First, Second, Third, Fourth, Fifth, Ninth, and Eleventh Circuits have all concluded that a decision by an IJ to grant or deny a continuance is not a decision "the authority for which is specified" under the relevant subchapter of the INA "to be in the discretion of the Attorney General," 8 U.S.C. 1252(a)(2)(B)(ii), because an IJ's discretionary authority to act on a motion for a continuance is specified in a regulation, not a statutory provision within the relevant subchapter itself. See *Sandoval-Luna* v. *Mukasey*, 526 F.3d 1243, 1246-1247 (9th Cir. 2008); *Lendo* v. *Gonzales*, 493 F.3d 439, 441 n.1 (4th Cir. 2007); *Alsamhouri* v. *Gonzales*, 484 F.3d 117, 122 (1st Cir. 2007); *Zafar* v. *United States Att'y Gen.*, 461 F.3d 1357, 1360 (11th Cir. 2006); *Khan* v. *Attorney Gen. of the United States*, 448 F.3d 226, 232-233 (3d Cir. 2006); *Ahmed* v. *Gonzales*, 447 F.3d 433, 436-437 (5th Cir. 2006)[8]; *Sanusi* v. *Gonzales*, 445 F.3d 193, 198-199 & n.8 (2d Cir. 2006) (per curiam). The Sixth Circuit has reached the same result

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[8] Petitioner also cites (Pet. 21) *Zhao* v. *Gonzales*, 404 F.3d 295 (5th Cir. 2005), but that case is inapposite, because it concerns the court of appeals' jurisdiction to review the BIA's denial of a motion to reopen, not the court of appeals' jurisdiction to review an IJ's denial of a motion for a continuance.

through a different analysis, concluding that "Section 1252(a)(2)(B)(ii) only applies to the portions of subchapter II left to the Attorney General's discretion, not the portions of subchapter II that leave discretion with IJs in matters where IJs are merit decision-makers that are subject to [the courts of appeals'] review." *Abu-Khaliel* v. *Gonzales*, 436 F.3d 627, 632, 634 (2006).

b. As the government concluded over a year ago, after reexamining its prior position on the issue, the majority position represents the better reading of the statute. See generally Gov't C.A. Br., *Alsamhouri*, *supra*, discussed at p. 14, *infra*. The relevant statutory text requires that the "authority" for the "decision or action" at issue—here, the denial of a continuance—be "specified under this subchapter [Subchapter II of Chapter 12 of Title 8] to be in the discretion of the Attorney General." 8 U.S.C. 1252(a)(2)(B)(ii). Nothing in the relevant statutory "subchapter," however, mentions continuances, or "specifie[s]" that they may be granted "in the discretion of the Attorney General." Rather, an IJ's authority to continue a case derives from regulations promulgated to implement statutory provisions that broadly authorize IJs to conduct removal hearings, but do not specifically authorize them to grant or deny continuances. See, *e.g.*, 8 U.S.C. 1229a(a)(1). Given the general presumption in favor of judicial review, *INS* v. *St. Cyr*, 533 U.S. 289, 298 (2001), and the terms of Section 1252(a)(2)(B)(ii), the government agrees with the majority of circuit courts that an IJ's discretionary decision to deny a continuance is not covered by the jurisdictional bar in 8 U.S.C. 1252(a)(2)(B)(ii). The government did not argue otherwise to the court below. See Gov't C.A. Br. 17 n.8.

c. As discussed above, the courts of appeals are divided with respect to the first question upon which petitioner seeks review. This Court's review is not warranted at this time, because the conflict in lower-court authority may well resolve itself without this Court's intervention, and because the issue concerns a narrow issue of unreviewability that is unlikely to affect the outcome of many cases.

Prior to December 2006, the government had taken the position that 8 U.S.C. 1252(a)(2)(B)(ii) precludes federal-court review of an IJ's denial of a continuance. In December 2006, in response to a petition for rehearing in *Alsamhouri* v. *Gonzales*, the government reconsidered its position and concluded that the view of the majority of courts is correct. See Gov't C.A. Br. 7-13, *Alsamhouri*, *supra*. In *Alsamhouri*, the First Circuit initially had held that it "ha[d] no jurisdiction over whether the denial of a continuance was an abuse of discretion." 458 F.3d 15, 16 (2006), withdrawn on petition for reh'g, 471 F.3d 209, 210 (2006). In response to the government's change in position, the First Circuit reversed course, "adopt[ed] the majority rule," and held that it "ha[d] jurisdiction to review a denial of a continuance." 484 F.3d at 122. The Eighth Circuit, which has also adopted the minority position, has suggested that it may well reconsider its holding in light of the government's recent change in position. See *Ikenokwalu-White* v. *Gonzales*, 495 F.3d 919, 924 n.2 (2007) (suggesting that "it may be appropriate for our court to revisit this issue en banc," but noting that the "present case is [not] the most appropriate vehicle for doing so").

In *Ali*, the Seventh Circuit acknowledged the Attorney General's recent change in position, but stated that it "disagree[d]" with the Attorney General's view. 502

F.3d at 660. The opinion further stated that it had "been circulated among all judges of th[at] Court in regular active service" and that "[a] majority did not favor rehearing en banc on the question of whether the jurisdiction-stripping provision, 8 U.S.C. § 1252(a)(2)(B)(ii), applies to continuance decisions of immigration judges"; the opinion also noted, however, that four judges had voted to rehear the case en banc. *Id.* at 661 n.1.

Other developments in the Seventh Circuit since the issuance of the decision below suggest, however, that the court may be willing to revisit the question presented en banc. In December 2007, the Seventh Circuit issued an order directing the government to respond to a petition for rehearing en banc in *Potdar* v. *Keisler*, 505 F.3d 680 (2007). The threshold question raised by that petition is whether the panel erred in concluding that "it lacked jurisdiction under * * * [8 U.S.C.] 1252(a)(2)(B)(ii) to review a denial of a continuance requested by [the alien] to enable him to pursue an application for adjustment of status." Pet. App. 65a. In February 2008, the government filed a response, in which it urged en banc rehearing on that threshold question. Pet. 20; Pet. App. 88a-92a.[9] In June 2008, the court granted panel rehearing in *Potdar* on the question "whether, in this case, this court has jurisdiction to review the BIA's order concerning the motion to reopen because this case falls within the

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[9] The government's response also noted that there is a factual question in *Potdar* about whether the motion the IJ denied actually was a motion for a continuance. The government argued that, in its view, the panel erred in treating the alien's motion to terminate exclusion proceedings as a motion for a continuance, Pet. App. 85a-87a, but suggested that, if the court of appeals declines to revisit that issue, it should grant rehearing en banc on the question whether it has jurisdiction to review a continuance denial, *id.* at 88a-92a.

exception to *Ali* v. *Gonzales*, 502 F.3d 659 (7th Cir. 2007) set forth in *Subhan* v. *Ashcroft*, 383 F.3d 591 (7th Cir. 2004)." 532 F.3d at 939.[10] Supplemental briefing is now underway and should be completed in October or November 2008.

As petitioner himself recognizes (Pet. 1, 22), the court's decision to grant rehearing in *Potdar* suggests that the jurisdictional issue is still in flux in the Seventh Circuit. Although the court granted panel rehearing on a more narrow basis than that urged by the government, the court may still grant rehearing en banc in *Potdar* or in another case. That is especially true because four judges of the court of appeals have recently reiterated their view that the court should revisit en banc the question whether it has jurisdiction to review continuance denials under 8 U.S.C. 1252(a)(2)(B)(ii). See *Kucana* v. *Mukasey*, 533 F.3d 534, 541-542 (7th Cir. 2008) (Ripple, J., dissenting from denial of rehearing en banc); see also *Ali*, 502 F.3d at 661 n.1. It would thus be prudent for this Court to decline to resolve the disagreement in the circuit courts at this time.[11]

There is, moreover, no pressing need for review by this Court, because the issue concerns a narrow aspect of judicial review in the courts of appeals affecting only

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[10] In *Subhan*, the court held that it retained jurisdiction to review a continuance denial where "the denial of a continuance effectively nullified the statutory opportunity to adjust status" and the IJ failed to give a reason consistent with the adjustment of status statute. *Ali*, 502 F.3d at 662-663 (citing *Subhan*, 383 F.3d at 593-594).

[11] The Court should not, as petitioner suggests (Pet. 22), hold the petition pending the Seventh Circuit's ultimate resolution of *Potdar*, because petitioner's claim that the IJ abused his discretion lacks merit and because petitioner likely cannot obtain adjustment of status in any event. See pp. 17-22, *supra*.

one procedural aspect of the conduct of removal proceedings. The IJ's denial of a motion for a continuance is reviewable by the BIA only for abuse of discretion and requires a showing of substantial prejudice. The scope of any judicial review would be at least as deferential. The question whether such judicial review is available therefore is likely to affect the outcome of very few cases, as this case amply demonstrates: The IJ manifestly did not abuse his discretion in denying a motion for a continuance here. See pp. 17-19, *infra*. Nor is this case unusual in that respect: In fact, *all* of the previously cited decisions that found judicial review authorized, see pp. 11-13, *supra*; see also Pet. 20-21, *also* concluded that the denial of the alien's request for a continuance did not constitute grounds for overturning the IJ's decision. See *Sandoval-Luna*, 526 F.3d at 1247; *Lendo*, 493 F.3d at 442; *Alsamhouri*, 484 F.3d at 122; *Zafar*, 461 F.3d at 1362; *Khan*, 448 F.3d at 235; *Ahmed*, 447 F.3d at 438; *Sanusi*, 445 F.3d at 200; *Abu-Khaliel*, 436 F.3d at 634. Review therefore is not warranted at this time.

d. Even if the issue were presently ripe for and warranted this Court's review, this case would be an unsuitable vehicle for resolving it.

First, the claim upon which petitioner sought to obtain review in the court of appeals—that the IJ abused his discretion in denying petitioner's request for a continuance—is meritless. An IJ's continuance denial should be upheld "unless it was made without a rational explanation, it inexplicably departed from established policies, or it rested on an impermissible basis, *e.g.*, invidious discrimination against a particular race or group." *Cordoba-Chaves* v. *INS*, 946 F.2d 1244, 1246 (7th Cir. 1991).

Here, the IJ found that petitioner was removable as charged. Pet. App. 4a. Petitioner has no entitlement to stay in this country illegally. *E.g.*, *Elkins* v. *Moreno*, 435 U.S. 647, 667 (1978). The IJ provided sufficient explanation for his decision to deny petitioner's request for a further continuance. The IJ had already granted petitioner a continuance of more than six months to permit adjudication of the visa petition based on his first marriage. AR1 215-216. Petitioner then divorced and remarried only twelve days before his continued hearing. *Ibid.* The new relative visa petition was filed only one week before the hearing. Pet. App. 4a. As the IJ noted, there was no significant possibility that petitioner would become eligible for adjustment of status anytime soon, because not only did petitioner lack an approved relative visa petition, but the new relative visa petition had just been filed, and it was not likely the petition would be granted because petitioner bore the heavy burden of proving that his marriage was *bona fide*, a burden he did not attempt to satisfy at his hearing. See AR1 217; Pet. App. 19a-20a (citing *In re Arthur*, 20 I. & N. Dec. 475 (B.I.A. 1992)).[12] Moreover, even if the relative visa peti-

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[12] In 2002, the BIA modified its holding in *Arthur* in *In re Velarde-Pacheco*, 23 I. & N. Dec. 253 (B.I.A. 2002). Although the IJ cited only *Arthur*, and not *Velarde-Pacheco*, that omission provides no basis for second-guessing the IJ's continuance denial here, because both *Arthur* and *Velarde-Pacheco* hold that an alien who marries after being placed in removal proceedings has the "heavy burden" of proving his marriage was not fraudulent. *Arthur*, 20 I. & N. Dec. at 479; see *Velarde-Pacheco*, 23 I. & N. Dec. at 256 (alien must provide, *inter alia*, "clear and convincing evidence indicating a strong likelihood that [his] marriage is bona fide"). In any event, there is no doubt that both the IJ and the BIA considered *Velarde-Pacheco*, because counsel for the government pointed the case out to the IJ at petitioner's removal hearing, AR1

tion were granted, petitioner would not have been immediately eligible for a visa, because Mohamed was a lawful permanent resident, not a U.S. citizen, at that time. See Gov't C.A. Br. 18 n.10. The IJ considered all of those circumstances and determined that a continuance was not warranted. AR1 215-220; Pet. App. 19a-21a.[13] Because the IJ gave a rational explanation for his refusal to grant a continuance, there was no abuse of discretion.

Second, the BIA held in its decision denying petitioner's untimely motion to reopen that he is statutorily ineligible to obtain the ultimate relief he seeks—adjustment of status—because he has overstayed his period of voluntary departure. Pet. App. 10a-11a. In proceedings before the administrative agency, petitioner requested voluntary departure in lieu of removal, and the BIA ultimately granted him 30 days within which to depart the United States voluntarily. *Id.* at 12a-13a. Both the IJ and the BIA specifically warned petitioner of the consequences of failing to comply with his voluntary departure order, including the consequence that he would be ineligible to seek discretionary adjustment of status for a period of ten years. *Id.* at 13a, 21a-22a.[14] Petitioner

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209, and the BIA referred to the case in denying petitioner's motion for reconsideration, AR1 2.

[13] Petitioner suggests (Pet. 8) that a continuance was also warranted to permit him to further investigate whether his student visa petition was pending. The IJ did not abuse his discretion in denying the continuance on that basis, however. The IJ had already determined at a prior hearing that petitioner was removable as charged because petitioner admitted that his student visa application had never been approved. AR1 201-203, 207.

[14] Petitioner never obtained a stay of voluntary departure. See p. 9 & note 7, *supra*. Although petitioner received a stay of removal from the court of appeals, Pet. App. 6a, he never sought a stay of his period of voluntary departure from that court. See *Alimi* v. *Ashcroft*, 391 F.3d

has nonetheless failed to depart the United States voluntarily.

In denying his motion to reopen, the BIA determined that petitioner is statutorily ineligible for adjustment of status because he failed to depart voluntarily. Pet. App. 10a-11a; see 8 U.S.C. 1229c(d)(1)(B); 8 C.F.R. 1240.26(a) (same); see also *Dada* v. *Mukasey*, 128 S. Ct. 2307, 2310 (2008) ("[f]ailure to depart within the prescribed [voluntary departure time] renders the alien ineligible for certain forms of relief, including adjustment of status, for a period of 10 years").[15] Petitioner never challenged that finding before the agency. Instead, he suggested for the first time in his reply brief in the court of appeals that he could escape the consequences of his failure to depart because he did not post a voluntary departure bond. Pet. C.A. Reply Br. 17. Petitioner relied on *In re Diaz-Ruacho*, 24 I. & N. Dec. 47, 47 (B.I.A. 2006), in which the BIA held that "an alien who fails to meet the voluntary departure bond requirement is not subject to the penalties of [8 U.S.C. 1229c(d)]." See Pet. C.A. Reply Br. 17.[16]

888, 892-893 (7th Cir. 2004) (court of appeals stay order does not also stay the period of voluntary departure where the alien did not expressly ask for such relief); see also Br. in Opp. at 20-24, *Gulati*, *supra* (noting that there is a serious question whether a federal court has the authority to stay the expiration of a period of voluntary departure).

[15] In *Dada*, this Court held that an "alien must be permitted an opportunity to withdraw [a] motion for voluntary departure, provided the request is made before the departure period expires." 128 S. Ct. at 2311. That holding has no impact on this case, because petitioner never sought to withdraw his motion for voluntary departure. See Pet. App. 10a-13a.

[16] The Department of Justice has proposed an amendment to the relevant regulation that would prospectively abrogate the holding of *Diaz-Ruacho*. See Executive Office for Immigration Review, Dep't of

Because petitioner did not raise the question whether his failure to post a voluntary departure bond relieves him of the penalties for failing to depart before the BIA, he failed to exhaust his administrative remedies on the claim, and a reviewing court is therefore without jurisdiction to consider it. See 8 U.S.C. 1252(d)(1). That rule is especially apt here, because the question whether petitioner posted a voluntary departure bond is precisely the type of factual determination entrusted to the agency in the first instance. Moreover, the court of appeals apparently rejected the claim, see Pet. App. 8a (finding "without merit" other matters raised by petitioner) and petitioner does not renew the claim that he is not subject to the voluntary departure penalties in his petition.

In any event, even if petitioner were not barred by statute from obtaining adjustment of status, it is highly unlikely that the agency would determine that he merits a favorable exercise of discretion and permit him to adjust his status in light of his manipulation of the voluntary departure rules. Petitioner told the IJ that he was willing to depart voluntarily, and he did not bring his alleged failure to file a voluntary departure bond to the IJ's or BIA's attention, instead making a last-minute plea to the court of appeals to relieve him of an obligation he willingly undertook. See, *e.g.*, *Patel*, 17 I. & N. Dec. at 601-602 ("An applicant has the burden of showing that discretion should be exercised in his favor," and "where adverse factors are present, it may be necessary for the applicant to offset those factors by a showing of unusual or even outstanding equities.").

Justice, *Voluntary Departure: Effect of a Motion to Reopen or Reconsider or a Petition for Review*, 72 Fed. Reg. 67,674, 67,683-67,684, 67,686 (2007) (proposing amendment to 8 C.F.R. 1240.26(c)(3)).

Because petitioner likely cannot obtain the underlying relief that he seeks, his case is not a suitable vehicle for resolving the question whether 8 U.S.C. 1252(a)(2)(B)(ii) precludes judicial review of the denial of a continuance. Further review is therefore unwarranted.[17]

2. Petitioner also contends (Pet. 31-37) that his due process rights were violated due to some indiscernible notations in the transcript of his removal hearing. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of another court of appeals or of this Court. Further review of petitioner's fact-bound claim is therefore unwarranted.

The court of appeals correctly rejected petitioner's claim that eleven notations of "indiscernible" in the approximately 40-page transcript of his removal proceedings violated his due process rights. As an initial matter, petitioner has no constitutionally protected liberty interest in discretionary immigration relief such as an adjustment of status. See, *e.g.*, *Jupiter* v. *Ashcroft*, 396 F.3d 487, 492 (1st Cir.), cert. denied, 546 U.S. 938 (2005); *Tovar-Landin* v. *Ashcroft*, 361 F.3d 1164, 1166-1167 (9th Cir. 2004); *Mireles-Valdez* v. *Ashcroft*, 349 F.3d 213, 219 (5th Cir. 2003); *Nativi-Gomez* v. *Ashcroft*, 344 F.3d 805, 809 (8th Cir. 2003). To the extent that petitioner has a liberty interest in avoiding removal from the United States, that liberty interest was accorded constitution-

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[17] Petitioner suggests in passing (Pet. i, 2-3) that, if 8 U.S.C. 1252(a)(2)(B)(ii) bars judicial review of discretionary denials of continuances generally, the court of appeals nonetheless had jurisdiction over his claim under 8 U.S.C. 1252(a)(2)(D) because he presented a constitutional claim or question of law. Petitioner did not present argument on that issue in his petition, nor did he present that issue to the court of appeals.

ally adequate due process because petitioner was afforded notice and an opportunity to contest the charge of removability. Petitioner had a hearing before an IJ, who permitted him to present evidence and arguments, and then concluded that petitioner was removable as charged. AR1 197-223; Pet. App. 19a. Petitioner claimed that he was not removable because he had a pending student visa application, but he never produced any evidence of that application, and he acknowledged to the IJ that the application had never been approved. AR1 201-203. (As it turns out, petitioner had abandoned that application, and it had been denied prior to his removal hearing. See p. 6 n.3, *supra*.) The BIA, like the IJ, determined that petitioner was removable as charged. Pet. App. 12a-13a. Petitioner therefore received the process he was due.

Petitioner is mistaken in suggesting (Pet. 35) that the eleven "indiscernible" notations in the lengthy transcript deprived him of a "meaningful opportunity to be heard." It is well-established that "[a]n error in the record or transcript does not by itself present a due process violation." *Sterkaj* v. *Gonzales*, 439 F.3d 273, 279 n.2 (6th Cir. 2006); see *Kheireddine* v. *Gonzales*, 427 F.3d 80, 85-86 (1st Cir. 2005) ("a mere failure of transcription, by itself, does not rise to a due process violation"). That is especially true here, where only *one* "indiscernible" notation occurred in actual testimony, AR1 203,[18] and petitioner was able to present his argument that (in his view) he was not removable because he had a pending student visa application, AR1 201-203.

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[18] All of the other "indiscernible" notations were in statements made either by petitioner's counsel, see AR1 201, 207, 216, 217, 220, by government counsel, see AR1 209, or by the IJ, see AR1 215, not by petitioner or a witness.

Further, petitioner has not established prejudice. "A litigant who seeks reversal on the ground of a denial of due process that is due to an inaccurate or incomplete transcript is * * * required to make the best feasible showing he can that a complete and accurate transcript would have changed the outcome of the case." *Ortiz-Salas* v. *INS*, 992 F.2d 105, 106 (7th Cir. 1993); see *Kuschchak* v. *Ashcroft*, 366 F.3d 597, 602 (7th Cir. 2004) (alien must offer "concrete evidence indicating that the due process violation had the potential for affecting the outcome of the hearing" (internal quotation marks omitted)). Petitioner has not described what evidence or argument was obscured by eleven "indiscernible" notations in the lengthy transcript, let alone explain how such evidence "would have changed the outcome of the case." *Ortiz-Salas*, 992 F.2d at 107. His conclusory affidavit, Pet. App. 107a-116a, which was not submitted to the BIA,[19] stated only that he wished to present additional evidence to show that he submitted a student visa application, *id.* at 113a. But petitioner acknowledged that the application was never approved, AR1 203, and thus he cannot show that the outcome would have been different had he presented that additional evidence. The court of appeals therefore correctly rejected his claim. See, *e.g.*, *Ortiz-Salas*, 992 F.2d at 106-107 (rejecting alien's due process claim, despite 292 errors in transcript, when alien "made no effort to show that the testimony that was not transcribed was material"); *In re*

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[19] Petitioner submitted the affidavit to the court of appeals in July 2004, as an attachment to his reply brief in support of his motion for a stay of removal. See *Al Marbu* v. *Mukasey*, No. 04-2055 (7th Cir.). Petitioner submitted a similar but shorter affidavit to the BIA, but not until April 2004, when he filed a motion for a stay of removal. See AR1 18-20.

Stapleton, 15 I. & N. Dec. 469, 470 (B.I.A. 1975) (incomplete transcript did not constitute due process violation where the alien failed to show prejudice).

Petitioner asserts in passing (Pet. 33) that there is disagreement in the circuits regarding the legal standard for finding a due process violation based on an inadequate transcript. He is mistaken. Petitioner cites (*ibid.*) only one case in support of the alleged circuit split, *Silva-Calderon* v. *Ashcroft*, 371 F.3d 1135, 1137 (9th Cir. 2004), where the court of appeals expressly "decline[d] * * * to weigh in on the merits of [the alien's] due process claims." That case did not address the due process standard, nor did it mention any disagreement in the circuits. Petitioner has not otherwise explained how there is any disagreement in the circuits, and the cases he cites belie that proposition.

Finally, petitioner suggests (Pet. 31-33) that reversal is warranted because his transcript violates the INA, the relevant regulations, and the Court Reporter Act. As an initial matter, those argument were neither presented to nor passed on by the court of appeals, and this Court should not consider them in the first instance. See, *e.g.*, *United States* v. *Williams*, 504 U.S. 36, 41 (1992). In any event, petitioner is mistaken. The INA provides that an alien has a right to "a complete record * * * of all testimony and evidence produced at the proceeding." 8 U.S.C. 1229a(b)(4)(C). The implementing regulations provide that the contents of the record include "the testimony, exhibits, applications, proffers, and requests, the immigration judge's decision, and all written orders, motions, appeals, briefs, and other papers filed in the proceedings," and that "[t]he hearing shall be recorded verbatim except for statements made off the record with the permission of the immigration

judge." 8 C.F.R. 1240.9. Petitioner's transcript meets those requirements; a complete record of proceedings was prepared, and, as explained, there was only one "indiscernible" notation in testimony in forty pages of transcript. See pp. 23-24, *supra*. Petitioner provides no authority supporting his assertion to the contrary, and, in any event, he has not established that he was prejudiced by the "indiscernible" notations. See pp. 24-25, *supra*. Petitioner's claim regarding the Court Reporter Act likewise lacks merit, because that Act applies to *district court* proceedings, not administrative removal proceedings. 28 U.S.C. 753. Further review of petitioner's claims regarding the transcript of his IJ hearing is therefore unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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